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IN THE

SUPREME COURT OF THE UNITED STATES

PAUL TALCOTT CURRIER,
COMMUNICATION BRIDGE GLOBAL, INC.

Petitioner,

vs.

ROBERT CHOW,

Respondent.

On Petition for Writ of Certiorari to the First District California Court of Appeals, Div. Five

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When a court refuses to grant equitable relief from default to a corporation that never received its day in court, due to oppressive malicious prosecution and fraud, are the Due Process Clauses of the Fifth and Fourteenth Amendments violated?

2. Is a corporation entitled to equitable relief from a judgment obtained by plaintiffs who: (a) fraudulently converted that corporation's assets under color of state law; (b) caused the corporation to become insolvent; and © then took default judgment against that corporation, which could not defend itself from the suit because it had no funds to hire an attorney?

3. When a corporation's two successive attorneys' gross malpractice and repeated positive misconduct cause a default judgment to be entered against their client corporation, and that corporation, then insolvent, cannot afford a third attorney, is it appropriate to grant the corporation equitable relief, when the corporation applies for relief from default immediately after obtaining new legal counsel?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The petitioner has no parent, and there are no publicly held companies that hold any stock of the petitioner.

III. TABLE OF CONTENTS

QUESTIONS PRESENTED I

RULE 29.6 CORPORATE
DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

CITATIONS TO OPINIONS AND
ORDERS ENTERED IN THE
INSTANT CASE 1

STATEMENT OF THE BASIS OF THE
JURISDICTION OF THIS COURT 1

CONSTITUTIONAL PROVISIONS,
STATUTES, AND OTHER LAW
INVOLVED IN THIS APPEAL 2

STATEMENT OF THE CASE 2

REASONS GRANT THE PETITION 10

I. This Case Involves Important Issues of Corporate Constitutional Rights under the First, Fourth, Fifth, and Fourteenth Amendments. 10

A. The Fifth and Fourteenth Amendments Both Guarantee "Due Process of Law" to Corporations; Thus Equitable Relief From Judgment is Due Where a Corporation Was Denied its Due Process Rights 11

B. The Courts' Denial of Relief from Default Denied CBG its First Amendment Petition Rights 14

C. This Case Presents a Corporate Fourth Amendment Rights Issue. 15

II. There is a Split of Authority Between the Sixth Circuit and the Fourth and Ninth Circuit as to What Constitutes Judgment-Nullifying Fraud. 16

III. Either Federal Test Warrants Relief from Judgment for CBG. 19

IV. This Court Should Overrule the California Court Of Appeal's Erroneous Interpretation of *Throckmorton*, the Due Process Clause, and Basic Agency Principles So Other Litigants Will Not Suffer From That Court's, and the Trial Court's, Misunderstanding of the Law. 23

CONCLUSION 30

IV. TABLE OF AUTHORITIES

Case Law:

Alexander v. Robertson,
882 F.2d 421, 424 (9th Cir. 1989) 21

Bracy v. Gramley (1997)
520 U.S. 899, 908-09, 117 S.Ct. 1793 12

Bradley v. Rosenthal
(1908) 154 Cal. 420, 425 -427 28

Central Hudson Gas & Electric Corporation, Appellant, v. Public Service Commission of New York
(1980) 447 U.S. 557 11

Conforti v. Dunmeyer (1962)
209 Cal.App.2d 41, 44 24,25

Davis v. Musler,
713 F.2d 907, 916 (2nd Cir. 1983) 24

Dei Tos v. Dei Tos,
(1951) 105 Cal.App.2d 81, 84. 25,27

Demjanjuk v. Petrovsky,
10 F.3d 338, 348 (6th Cir. 1993) 17

Fraass Survival Systems, Inc. v. Absentee Shawnee Economic Development Authority (S.D.N.Y. 1993)
817 F.Supp. 7, 10 13

Girard v. Monrovia School Dist.
(1953) 121 Cal.App.2d 737, 740 12

Great Coastal Express, Inc. v. International Brotherhood of Teamsters,
675 F.2d 1349, 1356 (4th Cir. 1982) 18

In re Holliday's Tax Services, Inc.
417 F.Supp. 182, 183,
affirmed w/o opinion
614 F.2d 1287 (2nd Cir. 1979) 12,13

In re Intermagnetics America, Inc.
926 F.2d 912, 916 - 917 (9th Cir. 1991) 17

In re Rachel M. (2004)
113 Cal.App.4th 1289,
1297, rehearing denied
and review denied 7

Kulchar v. Kulchar
(1969) 1 Cal.3d 467, 471 7

Lady Kelly, Inc. v. U.S. Sec'y of Agr.
414 F.Supp.2d 1298, 1299,
fn. 1. (CIT 2006) 13

Lathrop v. HealthCare Partners Medical Group (2004) 114
Cal.App.4th 1412, 1423 28

Local 59 v. Superline Transp. Co.,
953 F.2d 17, 21 (1st Cir. 1992) 24

Marsh[illegible] v. Barlow's, Inc. (1978)
436 U.S. 307 11

Metropolitan Life Ins. Co. v. Ward
(1985) 470 U.S. 869, rehearing
denied 471 U.S. 1120, on
remand *Ex Parte Ward*,
479 So.2d 41 11

Mine Workers v. Illinois Bar Assn.
(1967) 389 U. S. 217, 222 15

Olivera v. Grace (1942)
19 Cal.2d 570, 579. 25

Pepper v. Litton
(1939) 308 U.S. 295, 296-297, 301,305 ..... 28, 29

RK Ventures, Inc. v. City of Seattle
(9th Cir. 2002) 307 F.3d 1045 11

Rowland v. California Men's Colony
(1993) 506 U.S. 194, 201 - 202,
113 S.Ct. 716, 721 13,15

Serzysko v. Chase Manhattan Bank,
461 F.2d 699, 702 (2nd Cir. 1972) 22

Shaw v. Hughes Aircraft Co.
(2000) 83 Cal.App.4th 1336, 1347 28

Sniadach v. Family Finance Corp.
(1969) 395 U.S. 337, 338-339, 342,
89 S.Ct. 1820. 12

Southerland v. County of Oakland,
77 F.R.D. 727, 732-733
(E.D. Mich. 1978), *aff'd*
sub nom. Southerland v. Irons
628 F.2d 978, 980 (6th Cir. 1980) 21

TCI Group Life Ins. Plan v. Knoebber,
244 F.3d 691, 695-699.(9th Cir. 2001) 12

Tozer v. Charles A. Krause Milling Co.
189 F.2d 242, 244 (3d Cir. 1951) 24

United States v. Cruikshank (1876)
92 U. S. 542, 552 15

United States v. Martin Linen Supply Co.,
(1977) 430 U.S. 564, 566-567 11

United States v. Nickl
427 F.3d 1286 (10th Cir. 2005) 12

Valerio v. Boise-Cascade Co.,
80 F.R.D. 626, 640, n. 10
(N.D. Cal. 1978),
aff'd per curiam,
645 F.2d 699, 700 (9th Cir. 1981) 22

Federal Rules of Civil Procedure:

60(b) 24

Statutes:

California Civil Code §3517 14

28 U.S.C. §1257(a) 1

42 U.S.C §1983 11

Treatises and Practice Guides:

12 *Moore's Fed. Practice* (3d Ed., 2006 update), RELIEF FROM JUDGMENT OR ORDER, at §60.21[4][b], p. 60-54. 17

12 *Moore's Fed. Practice*, supra, RELIEF FROM JUDGMENT OR ORDER, at §60.21[4][e], pp. 60-59 - 60-60 21

Rest.2d Agency, §217 B, p. 472 28

CITATIONS TO OPINIONS AND ORDERS ENTERED IN THE INSTANT CASE

This case was San Francisco Superior Court Case No. CGC-01-323394, California Court of Appeals, First District, Division Five, Case No. A110455, and also California Supreme Court Case No. S142537. All opinions and orders in this case were not published.

STATEMENT OF THE BASIS OF THE JURISDICTION OF THIS COURT

The order sought to be reviewed is that of the California Court of Appeals, First District, Division Five, which was entered on February 28, 2006[1]. Petitioner CBG filed a petition for writ of certiorari with the California Supreme Court on April 10, 2006, and the California Supreme Court's order denying certiorari was issued on May 24, 2006.

On August 18, 2006, Justice Kennedy of this Court issued an extension of time, up to and including October 6, 2006, to file the petition for writ of certiorari in this action[2].

The statutory provision that allows this Court to review the decision of the California Court of Appeal after the denial of CBG's petition for writ of certiorari is 28 U.S.C. §1257(a).

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[1] Appendix Vol I., at 23a - 27a.

[2] Appendix Vol. I, at 29a .

CONSTITUTIONAL PROVISIONS, STATUTES, AND OTHER LAW INVOLVED IN THIS APPEAL.

The provisions of the U.S. Constitution involved in this appeal are the First, Fourth, Fifth, and Fourteenth Amendments.

This case also involves a review of the common-law rule against corporate self-representation, that is, representation of corporations in court by any corporate employee, agent, officer, shareholder, or director who is not a licensed attorney.

STATEMENT OF THE CASE

Respondent Robert Chow ("Chow") wrongfully converted (i.e. stole) the assets of Petitioner Communication Bridge Global ("CBG") when he fraudulently obtained a restraining orde. "Chow's restraining order" or "the restraining order") against Paul Talcott Currier ("Currier"), the CEO and only human agent of CBG.

Chow' obtained the restraining order in San Francisco Superior Court Case No. CGC-01-323391, *Communication Bridge USA, Inc. v. Paul Talcott Currier, Communications Bridge Global, Inc.*, et al., ("*CBUSA v. Currier & CBG*") Chow's restraining order forced Currier onto the street. In *CBUSA v. Currier & CBG*, Chow falsely alleged that Currier was trespassing in CBUSA's corporate offices after allegedly having been removed from Currier's position as Chief Executive Officer of CBUSA. Chow's aforementioned allegations were false for two reasons: (1) the

election in which Currier was purportedly removed as CEO of CBUSA had been rigged by Chow with forged proxies and was fraudulent; and (2) the offices used by CBUSA were also leased by Currier and several corporations Chow about which Chow omitted to inform the Court. Those offices were in fact, also the home of Currier and several other corporations run by Currier, including CBG.

The emergency *ex parte* restraining order was executed by the San Francisco Sheriff's Department and forced Currier onto the street without hearing, with no possessions other than the clothing on his back. Chow's personal attorneys, Michael Fish ("Fish"), Thomas Mauriello ("Mauriello"), and Philip Snell ("Snell"), seized all property which belonged to CBUSA, CBG, Currier, and Currier's corporations, regardless of the fact that the restraining order allowed Chow to seize the property of CBUSA only. The property and legal records of Currier's other corporations were never returned to him. Chow then filed a false bankruptcy on behalf of CBUSA. Chow and his agents then stripped CBUSA's offices of all Currier's, CBUSA's, and CBG's property, in violation of the Bankruptcy Code, since CBUSA's assets were assets of the U.S. Bankruptcy Trustee assigned to the case[3].

Currier had retained attorney Vincent Spohn ("Spohn"), both as his personal counsel an as counsel for CBUSA and CBG. Spohn not only refused to assist Currier in the legal defense of CBG, but assisted Chow in the execution of the

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[3]Bankr. N.D. Cal. Case No. 01-32161 DM.

fraudulent election and assisted Fish and Snell in the preparation of both underlying cases: (1) *CBUSA v. Currier & CBG* (S.F. Sup. Ct. Case no. 01-323391) and (2) *Chow v. Currier & CBG* (S.F. Sup. Ct. No. 01-323394). Spohn also later testified against Currier at trial in *Chow v. Currier & CBG*.

When Currier became aware that his first counsel, Vincent Spohn, would not assist him, but instead and in fact was working against his and CBG's interests, he immediately sought another, second, attorney to represent both himself and CBG. Despite his indigency, Currier borrowed money from his mother to retain the services of Ricardo C. Saria ("Saria") of Palo Alto, California. Currier retained Saria's services at the end of October of 2001.

Saria agreed to represent Currier and CBG in *Chow v. Currier & CBG*. Saria appeared only two or three times. In *Chow v. Currier & CBG*, Saria did absolutely nothing to protect Currier's or CBG's interests. Saria failed to make any appearance on behalf of CBG. Saria allowed default judgments to be entered against Currier and CBG. Saria also failed to follow the instructions given to him in an order on a motion to strike in *Chow v. Currier & CBG*, which resulted in Currier's cross-complaint against Chow being stricken from the underlying case. The striking of Currier's cross-complaint also damaged Currier, CBG's, and CBUSA's later federal action against Chow and others. Saria later withdrew from the representation of Currier, and implicitly, CBG, on whose behalf Saria never appeared! In a written admission of negligence and malpractice,

Saria later moved for relief from the default judgment on Currier's behalf, yet he did not do so on behalf of CBG. The default judgment remained intact as against CBG[4].

Currier, then indigent, had to defend himself at trial in *Chow v. Currier & CBG*. *CBUSA v. Currier & CBG* was stayed in September of 2001 due to the false bankruptcy of CBUSA by Plaintiff in that sister case. At trial, acting as his own lawyer, Currier prevailed without presenting a defense; he essentially won a motion for nonsuit on cross-examination alone. The trial judge, Judge Ernest Goldsmith of the San Francisco Superior Court, wrote, in the *Statement of Decision* following trial, that

> Chow's testimony that he would not have joined Currier in this venture does not ring true. The Court finds that the blame fixed on defendant Currier's nondisclosure by Plaintiff is a revisionist theory concocted by Chow. The court further finds that Chow's causes of action based on nondisclosure have no substance or merit whatsoever.[5]

By the time the *Statement of Decision* was issued by Judge Goldsmith, CBG had obtained legal counsel and had filed a federal lawsuit against Chow and others in reference to federal RICO and

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[4]Appendix Vol. I, 1a-3a, 28a.

[5]Appendix Vol I, 17a-18a.

antitrust claims[6]. An appeal in that case is now pending before the Ninth Circuit[7].

In early 2005, CBG filed motions for relief from default judgment in both *Chow v. Currier & CBG* ("323394") and its sister case, *CBUSA v. Currier & CBG* ("323391"). The allegations and causes of action in the complaints in both *Chow v. Currier & CBG* and *CBUSA v. Currier & CBG* were virtually identical, and are identical for the purposes of this petition. Both motions were based on the following arguments:

- Currier had thoroughly prevailed at trial in *Chow v. Currier & CBG*, and since Currier was the only human agent of CBG, CBG could not have committed any torts of breaches of contract unless Currier committed them. Therefore, a default judgment against CBG is logically inconsistent with Currier's complete exoneration at trial in the same case, and should be vacated.

- The wrongdoing of Chow caused CBG to be unable to defend itself in court and avoid a default judgment.

- CBG's corporate counsel, Vincent Spohn, corruptly sold out both Currier's and CBG's interests to Chow when he conspired with Chow to convert Currier's, CBG's, and CBUSA's assets through a fraudulent shareholder election, false bankruptcy, and malicious court prosecutions.

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[6]N.D. Cal. Case No. 04-3300 SI.

[7]Case No. 06-15390.

Spohn helped Chow execute the plan set forth in conspiracy.

The motions for relief from judgment also cited to this Court's decision in *U.S. v. Throckmorton*, which is widely cited as a seminal case setting forth the standards for equitable relief from default judgment[8]. All California and federal courts have adopted the *Throckmorton* standard[9]. CBG raised this federal due process issue at the trial court, and pressed on with it in the California Court of Appeal and its petition to the California Supreme Court[10].

The reason CBG has pressed forward with its attempts to vacate the $350,000.00[11] judgment against it, is that Currier and his shareholders, and the other director of CBG, Ordell Conrad, cannot use CBG as a mere disposable "shell" for doing business and limiting liability. CBG owns the rights to important telecommunications technology that was cross-licensed with CBUSA. As it stands, CBG cannot patent sell or license the technology without repossession of CBG's converted patent journals (i.e. patent journals seized by Chow), vindication, and relief from an

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[8] *U.S. v. Throckmorton* (1878) 98 U.S. 61, 66. California courts have adopted the *Throckmorton* rule for equitable relief from judgment.

[9] See, e.g., *In re Rachel M.* (2004) 113 Cal.App.4th 1289, 1297, rehearing denied and review denied, citing *Throckmorton* and *Kulchar v. Kulchar* (1969) 1 Cal.3d 467, 471 [California Supreme Court case that applied *Throckmorton* standard].

[10] Appendix Vol I, 34a; Vol II, 57a.

[11] Appendix Vol. I, 3a.

unjust and erroneous default, which the trial court's law and motion department refused to vacate. Furthermore, no venture capitalists will invest in a corporation with such a large judgment against it and with virtually no physical assets with which to satisfy the judgment. CBG's material asset is intellectual property seized by Chow and major telecommunication companies.

Both CBG motions for relief from judgment were heard on May 10 and May 11, 2005, respectively. While Judge Warren of the San Francisco Superior Court granted the motion CBG filed in *CBUSA v. Currier & CBG*, Judge Quidachay of the same court denied CBG's motion in *Chow v. Currier & CBG*. Judge Quidachay's order was based on the grounds that corporate liability and individual liability are different, and the fact that Currier prevailed at trial did not mean that CBG would also prevail at trial.

On appeal to the First District Court of Appeal, CBG set forth the same arguments listed above, and added the fact that both Spohn and Saria had similarly completely failed to represent their client CBG.

CBG also presented evidence that the California Supreme Court had ordered the State Bar to investigate the claims Currier had made against Spohn in his accusation against Spohn filed with the California Supreme Court. Currier filed the accusation against Spohn after the California State Bar refused to investigate Currier's multiple written complaints of Spohn's wrongdoing. The California Supreme Court-ordered State Bar

investigation of Spohn's actions is still pending as of the date of this writing[12].

The California Court of Appeal upheld Judge Quidachay's ruling on the grounds that CBG had not met the requirements for equitable relief from a default judgment because of a failure to demonstrate: (1) a meritorious case; (2) "a satisfactory excuse for not presenting a defense to the original action"; and (3) "diligence in seeking to set aside the default once discovered[13]."

When it found CBG had not demonstrated a meritorious case, the Court of Appeal noted that CBG failed to provide "an analysis of the causes of action that were alleged, the causes of action that were tried, the relationship between Currier and CBG, and possibly, issues of res judicata and collateral estoppel. CBG has not even attempted to analyze those issues."

The Court of Appeal assumed that CBG met the second factor because it did not have the funds necessary to defend the lawsuit. However, the Court of Appeal found :

> The third factor, diligence, is clearly lacking. The record indicates the judgment at issue was entered in February 2003 and that CBG waited more than two years to file its motion to vacate. CBG does not suggest that it was somehow unaware of the judgment; the only

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[12]See the California Supreme Court order remanding Currier's accusation to California State Bar, Appendix, Vol. II, 94a .

[13]Appendix, Vol. I, 27a.

excuse it provides for failing to file a motion earlier is that it lacked the funds to do so. However, CBG admits that its interests were aligned with Currier, and Currier filed a motion to set aside the judgment less than two months after it was entered[14].

The Court of Appeal also noted that:
CBG has not cited any case that holds a judgment may be set aside on the grounds of 'economic oppression' and it would be difficult to characterize 'economic oppression' as either 'fraud' or 'mistake' as those terms are commonly understood. However, we need not base our decision on this ground[15]...

CBG petitioned the California Supreme Court for a writ of certiorari to review the Court of Appeal decision, but the petition was denied on May 24, 2006.

REASONS TO GRANT THE PETITION

I. This Case Involves Important Issues of Corporate Constitutional Rights under the First, Fourth, Fifth, and Fourteenth Amendments.

The issue of whether an insolvent corporate defendant against whom a default has been taken by the parties that made it insolvent, should be granted relief from judgment based on the

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[14]Appendix Vol. I., 28a.

[15]Appendix, Vol I., 26a-28a.

corporation's inability to afford an attorney is appears to be one of first instance. CBG was unable to find any case law that addresses this issue.

A. The Fifth and Fourteenth Amendments Both Guarantee "Due Process of Law" to Corporations; Thus Equitable Relief From Judgment is Due Where a Corporation Was Denied its Due Process Rights.

The Fifth and Fourteenth Amendments both guarantee "due process of law" to all persons, natural or corporate, facing a trial in U.S. state or federal courts[16]. As this Court succinctly stated : "A fair trial in a fair tribunal is a basic

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[16]It is long-established law that corporations have Fourteenth Amendment right, just as natural persons do. See, for example,"Corporations are as much entitled to the equal protection of the laws guaranteed by the Fourteenth Amendment as natural persons." *Louis K. Liggett Co. v. Lee* (1933) 288 U.S. 517, 536. Similarly, corporations have First Amendment rights, as this Court held in *Central Hudson Gas & Electric Corporation, Appellant, v. Public Service Commission of New York* (1980) 447 U.S. 557. That a plaintiff is a corporation has no bearing on its standing to assert violations of the First Amendment and Fourteenth Amendment under 42 USC §1983 - *RK Ventures, Inc. v. City of Seattle* (9th Cir. 2002) 307 F.3d 1045; A corporation is a "person" within the meaning of the Fourteenth Amendment. *Metropolitan Life Ins. Co. v. Ward* (1985) 470 U.S. 869, 105 S.Ct. 1676, rehearing denied 471 U.S. 1120, 105 S.Ct. 2370, on remand *Ex Parte Ward*, 479 So.2d 41. Corporations also have rights under the Fourth and Fifth Amendments; see, e.g., *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) [corporations have Fourth Amendment rights against warrantless search and seizure]; *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 566-567 (1977) [corporation has Fifth Amendment right against double jeopardy]

requirement of due process[17]." The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases[18]. It is obvious that a corporation's being asked to perform the impossible - pay money it does not have and cannot get to hire an attorney - as a prerequisite to its appearance in court effectively denies the corporation any sort of trial before any sort of tribunal, fair or otherwise[19].

It also flies in the face of the decision of this Court in *Sniadach v. Family Finance Corp.*[20], in which this Court ruled that an alleged debtor's wages cannot be garnished to satisfy a claimed debt without either a prior hearing to determine the legitimacy of the debt or an extraordinary emergency, since it effectively denies corporations' in CBG's position any review of the legitimacy of the claims, ever. This also violates the federal and California policies favoring the adjudication of cases on their merits[21].

As such, this Court should review this case. It has been the long-standing rule to prohibit corporations from appearing in court through

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[17] *In re Murchison* (1955) 349 U.S. 133, 136, 75 S.Ct. 623, 625; see also *Bracy v. Gramley* (1997) 520 U.S. 899, 908-09, 117 S.Ct. 1793.

[18] *U.S. v. Nickl* (10th Cir. 2005) 427 F.3d 1286.

[19] This is noted in *In re Holliday's Tax Services, Inc.*, infra.

[20] (1969) 395 U.S. 337, 338-339, 342, 89 S.Ct. 1820.

[21] *Girard v. Monrovia School Dist.* (1953) 121 Cal.App.2d 737, 740; *TCI Group Life Ins. Plan v. Knoebber*, 244 F.3d 691, 695-699 (9th Cir. 2001).

anyone but a licensed attorney[22]. Some courts have recognized that a corporation can represent itself in court can "represent itself" through a non-attorney officer in court when the effect of barring such representation would effectively bar the corporation from the courts.

For example, in a case similar to this one, "[A] sole shareholder was permitted to represent his corporation in bankruptcy, because '[t]o require [the] corporation to appear by a lawyer is effectively to exclude it and its shareholder from the courts[23]."

However, this Court and the vast majority of the federal Circuit Courts of Appeals have rejected that reasoning and upheld the rule that a corporation must be represented by licensed counsel[24].

This legal impediment to a corporation's ability to defend itself from the actions of its own disloyal and treacherous officers, shareholders, or agents who cause a corporation to lose its assets (because the officers stole them), or from other persons who can wrongfully impoverish a corporation. As it

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[22] *Rowland v. California Men's Colony* (1993) 506 U.S. 194, 201 - 202, 113 S.Ct. 716, 721.

[23] *Fraass Survival Systems, Inc. v. Absentee Shawnee Economic Development Authority* (S.D.N.Y. 1993) 817 F.Supp. 7, 10 - citing *In re Holliday's Tax Services, Inc.* 417 F.Supp. 182, 183, affirmed w/o opinion 614 F.2d 1287 (2nd Cir. 1979).

[24] *Rowland*, supra, at 506 U.S. 202, n. 5, 113 S.Ct. 716, 721; see also *Lady Kelly, Inc. v. U.S. Sec'y of Agr.* 414 F.Supp.2d 1298, 1299, fn. 1. (CIT 2006).

stands, disloyal officers, shareholders or agents, or other miscreants can then sue the corporation at the end of their wrongdoing knowing that the corporation will not be able to defend itself. That creates an effective deterrent to the corporation's pursuit of further legal action, or operating as a business, in the future, and flies in the face of the equitable maxim " No one can take advantage of his own wrong[25]."

Since the rule against corporate self-representation is an effective "brick wall" that keeps an indigent corporate litigant out of court, it should be a sufficient legal excuse for the failure to present a defense. A corporation should be able to obtain relief from a judgment can show, in good faith, that it was financially unable to hire licensed legal representation the lawsuit before a default, but then later obtains funds to hire an attorney.

B. The Courts' Denial of Relief from Default Denied CBG its First Amendment Petition Rights

It is clear from many of this Court's decisions that the First Amendment's Petition clause provides protection to the right to petition for the redress of grievances, including by filing actions in the courts. As this Court stated in *BE & K CONSTRUCTION COMPANY v. NLRB*[26]:

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[25] California Civil Code §3517.

[26] (2002) 536 U.S. 516, 524-525.

> The First Amendment provides, in relevant part, that "Congress shall make no law ... abridging ... the right of the people ... to petition the Government for a redress of grievances." We have recognized this right to petition as one of "the most precious of the liberties safeguarded by the Bill of Rights[27]," and have explained that the right is implied by "[t]he very idea of a government, republican in form[28]."

As such, this Court should review this case. It has been the long-standing rule to prohibit corporations from appearing in court through anyone but a licensed attorney[29]. Unfortunately, that prohibits indigent corporations from filing lawsuits to protect their rights, such as the current litigation between CBG, Chow, and others, which CBG could not have prosecuted without legal representation.

C. This Case Presents a Corporate Fourth Amendment Rights Issue.

As noted in the Statement of the Case above, this litigation began when Chow and his attorneys obtained a fraudulent EPO in *CBUSA v. Currier & CBG*, which caused the San Francisco Sheriff's Department to remove Currier from his home and the offices of CBUSA, CBG, and Currier's other corporations, so as to seize the possessions of

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[27] *Mine Workers v. Illinois Bar Assn.* (1967) 389 U. S. 217, 222

[28] *United States v. Cruikshank*, (1876) 92 U. S. 542, 552.

[29] *Rowland v. California Men's Colony* (1993) 506 U.S. 194, 201 - 202, 113 S.Ct. 716, 721.

Currier and his corporations, and to allow Chow to ensure, by seizing all of Currier's, CBG's, and CBUSA's assets, that Currier would not be able to pay for any legal defense personally, for CBG, and for CBUSA or his other corporations.

In *Soldal v. Cook County*[30], where this Court found a Fourth Amendment claim arose where sheriff's deputies seized a person's mobile home by removing it from foundation and towing it away upon request of the mobile home park's owner even though the sheriff's deputies knew the owner had no valid eviction order. Imagine if Mr. Soldal were indigent and was told he could not contest those wrongful acts until he paid for an attorney! Any appeals court in the country would clearly find grounds for equitable relief from a judgment entered against Mr. Soldal in those circumstances. That is the case here.

II. There is a Split of Authority Between the Sixth Circuit and the Fourth and Ninth Circuit as to What Constitutes Judgment-Nullifying Fraud.

This Court's ruling in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*[31], made it clear that fraud that affects more than a single litigant and which subverts, or attempts to subvert, the judicial process is fraud that vitiates a judgment. Such a judgment can and should be vacated by the courts

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[30](1992) 506 U.S. 56, 71, 113 S.Ct. 538, 549.

[31](1944) 322 U.S. 238, 246, 251, 64 S.Ct. 997.

at any time, even many years after the judgment is entered[32].

As noted in *Moore's Federal Practice*[33] there is a split of authority between Sixth Circuit and the Fourth and Ninth Circuit's definition of fraud on court - Sixth Circuit's definition requires the presence of five factors:

> (1) conduct on the part of an officer of the court; (2) that is directed at the "judicial machinery" itself; (3) that is intentionally false, willfully blind to the truth, or is in reckless disregard [of[34]] truth or falsity; (4) that is a positive averment or is a concealment when one is under a duty to disclose; and (5) that deceives the court. Thus, misconduct of an officer of the court is an essential element of fraud on the court; but there is fraud on the court only if this misconduct precludes proper adjudication by the court[35].

The Ninth Circuit states only that such fraud must be "a species of fraud which does or attempts to, defile the court itself *or* is a fraud perpetrated by officers of the court" [Emphasis added][36]. The

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[32] *Id*, at 245 - 246.

[33] 12 *Moore's Fed. Practice* (3d Ed., 2006 update), RELIEF FROM JUDGMENT OR ORDER, at §60.21[4][b], p. 60-54.

[34] This word is published as "or" in *Moore's* and appears to be a typographical error.

[35] *Id.*, citing *Demjanjuk v. Petrovsky*, 10 F.3d 338, 348 (6th Cir. 1993).

[36] *Id.*, citing *In re Intermagnetics America, Inc.* 926 F.2d 912, 916 - 917 (9th Cir. 1991).

Fourth Circuit's definition is identical to that of the Ninth Circuit[37].

Thus, the Sixth Circuit definition conflicts with the Fourth and Ninth Circuits. The Sixth Circuit requires that fraud that invalidates a judgment be committed by an officer of the court, whereas the Fourth and Ninth Circuit's definition includes any fraud that would "defile" the court. Furthermore, the Sixth Circuit states that, to vitiate a judgment, the fraud must actually deceive the court, whereas the Fourth and Ninth Circuits both count *attempted* fraud as fraud that possibly requires the resulting judgments to be vacated. Perhaps the Fourth and Ninth Circuits are simply following this Court's holding in *Murchison*, which states that even the appearance of impropriety or partiality in a judicial proceeding is grounds for relief from judgment[38].

In any event, this case is an opportunity for this Court to resolve the apparent split of authority among the federal Circuit Courts of Appeal and elucidate the proper standard for equitable relief from judgment in the federal courts. This Court should not pass up such an opportunity to mend a rift in the decisional law that has existed for many years.

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[37] *Id.*, citing *Great Coastal Express, Inc. v. International Brotherhood of Teamsters*, 675 F.2d 1349, 1356 (4th Cir. 1982).

[38] *In re Murchison* (1955) 349 U.S. 133, 137, 75 S.Ct. 623, 625.

III. Either Federal Test Warrants Relief from Judgment for CBG.

The facts of the instant case meet both standards for equitable relief based on fraud listed above. In *CBUSA v. Currier & CBG*, the courts were defrauded by the falsely-sworn declarations of attorneys Michael Fish and Thomas Mauriello[39]. That fraud caused the court to issue an invalid emergency protective order ("EPO"). The EPO caused the San Francisco Sheriff's Department to evict Currier from CBUSA's offices, which were also CBG's office and Currier's home, as well as the domicile and location of both property and records, of corporations who have yet to appear in any case[40].

The purpose of the illegal eviction was to carry out Chow's plan to seize the assets (including both physical and intellectual property) of CBUSA, CBG, Currier, and other corporations run by Currier through an intentional fraud on the San Francisco Superior Court. The fraud on the court was intended to, and did, give Chow, Fish, Mauriello, and their co-conspirators the opportunity to seize the aforementioned assets and keep CBG, CBUSA, and Currier, out of competition in the global telecommunications market.

Therefore, in the instant case, officers of the Court (Fish and Mauriello) intentionally defrauded

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[39] Appendix, at Vol. I, 38a-39a, Vol. II, 61a.

[40] Appendix, at Vol. I, 34a, 37a-39a; Vol. II, 61a.

the court, and that fraud defiled the court by causing the court to issue an unjust EPO based on fraud. The enforcement of the EPO caused CBG and Currier, as well as Currier's other corporate entities, and the directors and shareholders of CBUSA, to suffer a manifest and harsh injustice. That is all that is needed to satisfy the Fourth or Ninth Circuit's test - a fraud on the court that defiles the court or was committed by an officer of the court.

The Sixth Circuit's test is also satisfied here. Officers of the court, Chow's attorneys, committed the fraud, which satisfies the first element. The fraud was intended to cause a court to issue an unjust EPO based on lies the attorneys presented as true facts. Thus, the "judicial machinery" is the object of the fraud, and the second element is satisfied. Chow's attorneys knew that some of the statements they made during the litigation of *CBUSA v. Currier & CBG* were false (e.g., Mauriello's statement that he had met Currier prior to service of the EPO when he had not). Chow's attorneys made other statements during the *Chow v. Currier & CBG* litigation with knowledge of their falsity, with willful blindness to the truth, or with total reckless disregard for their truth or falsity. For example, the trial judge who ruled on Chow's claims against Currier in *Chow v. Currier & CBG* found that Chow's claims were "revisionist" history and were utterly devoid of merit[41]. Thus, the third element of the Sixth Circuit test is satisfied. Since the statements to the court were presented in court pleadings and

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[41] *Statement of Decision*, Appendix 17a-18a.

testimony, the statements were positive averments or concealment of facts the attorneys were duty-bound to disclose. That satisfies the test's fourth element. The Court in *CBUSA v. Currier & CBG* issued the EPO and a later temporary restraining order based upon the false testimony, so the fifth element of the test, the court's actually being deceived, is satisfied.

Furthermore, CBG's *own attorneys* committed fraud that denied it a fair trial! Ricardo C. Saria ("Saria"), an attorney Currier hired to represent him and CBG, utterly failed even to appear on CBG's behalf. That failure resulted in the entry of default against CBG that gave rise to the motion to vacate the default, the subsequent appeal, and this petition[42]. It is clear that fraud need not be committed by an adverse party, nor does the fraud have to benefit the adverse party. For example, a party's own attorney's fraud against that party will support that party's motion for relief from judgment[43]. Saria's fraud was obviously intended to wrest a retainer fee from Currier, a fee which Saria never intended to earn through competent legal work.

Even before Saria's fraud on CBG, CBG's original corporate counsel, Vincent Spohn, committed fraud

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[42]Appendix, Vol. I, 24a; Vol. II, 47a, 58a, 59a, 66a, 75a.

[43]*Moore's Fed. Practice*, supra, RELIEF FROM JUDGMENT OR ORDER, at §60.21[4][e], pp. 60-59 - 60-60, citing *Alexander v. Robertson* 882 F.2d 421, 424 (9th Cir. 1989), and *Southerland v. County of Oakland*, 77 F.R.D. 727, 732-733 (E.D. Mich. 1978), *aff'd sub nom. Southerland v. Irons* 628 F.2d 978, 980 (6th Cir. 1980); *U.S. v. Throckmorton* (1878) 98 U.S. 61, 66.

against CBG when Spohn accepted responsibility as corporate counsel for both CBUSA and CBG. Then Spohn refused to defend CBG and Currier from Chow's frivolous lawsuits, and in fact testified against Currier at trial in *Chow v. Currier & CBG*[44]. According to *Throckmorton*, a case where an attorney "corruptly sells out his client's interest to the other side" is one where the judgment can be vacated, even after many years have passed since the entry of the judgment.[45]

All of the above factors entitle CBG to relief, despite the roughly two-and-a-half years that passed between the entry of the default judgment against CBG and its motion for relief from default. The *Hazel-Atlas* case made it clear that there is no time limit for the vacation of a judgment on the basis of fraud[46]. In fact, *Hazel-Atlas* involved the vacation of a twelve-year-old judgment[47].

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[44]Appendix, at Vol I., 34a, 35a, 38a, 39a, 42a; Vol. II, 47a, 57a, 58a, 65a, 66a, 75a, 79a-81a, 88a-90a. .

[45]*U.S. v. Throckmorton* (1878) 98 U.S. 61, 66.

[46]*Hazel-Atlas Glass Co.*, supra, 322 U.S. 238, 251, 64 S.Ct. 997; see also, e.g., *Serzysko v. Chase Manhattan Bank*, 461 F.2d 699, 702 (2nd Cir. 1972) ["[N]o time limit is specified" for relief based on fraud on the court]; *Valerio v. Boise-Cascade Co.*, 80 F.R.D. 626, 640, n. 10 (N.D. Cal. 1978), *aff'd per curiam*, 645 F.2d 699, 700 (9th Cir. 1981) ["There is no statute of limitations for fraud on the court."]

[47]*Hazel-Atlas*, supra, 322 U.S. 238, 251.

IV. This Court Should Overrule the California Court Of Appeal's Erroneous Interpretation of *Throckmorton*, the Due Process Clause, and Basic Agency Principles So Other Litigants Will Not Suffer From That Court's, and the Trial Court's, Misunderstanding of the Law.

This Court, in its *U.S. v. Throckmorton* decision, stated:

> "But there is an admitted exception to this general rule [of the finality of judgments] in cases where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practised on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of a suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side, – these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or

decree, and open the case for a new and fair hearing[48]."

The decision of the California Court of Appeal, First Appellate District, Division Five conflicts with *Throckmorton*, supra, which is based on centuries-old equitable principles, as well as the Due Process Clauses of the Fifth and Fourteenth Amendments. This is clear from the facts and law cited above. The Court of Appeal's own opinion clearly illustrates why.

As stated above, the California Court of Appeal rested its decision to uphold Judge Quidachay's decision to deny CBG equitable relief from judgment was based on two errors of law. First of all, the Court of Appeal found that CBG had to show not only a meritorious defense, but a defense that was absolutely guaranteed to prevail. That is not necessary under California or federal law; it is necessary simply to show allegations that would be valid defenses if proven at trial[49].

As the California Court of Appeal for the Fourth District stated in *Conforti v. Dunmeyer* :

"It is enough if the complaint [in an action to set aside a judgment] presents facts from which it can be ascertained that the plaintiff has a

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[48]*U.S. v. Throckmorton* (1878) 98 U.S. 61, 65-66.

[49]See, for example, these cases that interpret Fed.R.Civ.P. 60(b), which concerns motions for relief from judgment in federal courts on substantially the same grounds as motions directed at a court's equitable power, *Local 59 v. Superline Transp. Co.*, 953 F.2d 17, 21 (1st Cir. 1992); *Davis v. Musler*, 713 F.2d 907, 916 (2nd Cir. 1983); *Tozer v. Charles A. Krause Milling Co.* 189 F.2d 242, 244 (3d Cir. 1951).

sufficiently meritorious claim to entitle him to a trial of the issue at a proper adversary proceeding.[50]"

A judge's statement of decision, after trial in favor of the only human being accused of acting on behalf of a corporation for the same causes of action asserted against the corporation, stating that the causes of action are completely devoid of merit, is extremely strong, if not compelling, evidence that the case against the corporation is also devoid of merit, and that the judgment should be reversed. The Court of Appeal misapplied the standard for relief from judgment here.

Conforti is particularly appropriate here, because it involved an action in equity by a mentally incompetent person, through her guardian. The incompetent plaintiff could not defend herself in court in an underlying foreclosure action because she was mentally ill, and thus, unable to look after her own interests. The *Conforti* court held :

"While in this action there is no allegation of any fraud on the part of the respondents in the conduct of the foreclosure action such as the respondent knew that the appellant was incompetent, as in the *Dei Tos* case[51] ... the fact that there is no fraudulent design makes no difference in that the principle of the law involved is that "... through no fault of his the defendant was not permitted to participate in the

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[50]209 Cal.App.2d 41, 44, quoting *Olivera v. Grace* (1942) 19 Cal.2d 570, 579.

[51]*Dei Tos v. Dei Tos*, (1951) 105 Cal.App.2d 81, 84.

proceedings." [Citations omitted] Incompetent defendants are entitled to relief in equity such as are characterized as extrinsic mistake."

Similarly, in *Hoversten v. Superior Court*[52], the California Court of Appeal for the Second District ordered a California Superior Court to consider the options it listed to allow a prisoner visitation with his children, and overturned that trial court's earlier orders which denied him visitation rights. Hoversten's earlier attempts to vacate or modify those visitation orders were stymied by Hoversten's incarceration. The *Hoversten* court noted that "Prison walls are a powerful restraint on a litigant wishing to appear in a civil proceeding[53]."

Similarly, the rule against corporate self-representation is a very powerful restraint on an indigent corporation wishing to appear in a civil proceeding. There is no reason why a corporation that faces an insurmountable financial and legal barrier should be denied relief when such relief is granted to a prisoner that faces a similar physical and legal barrier.

A ruling from this Court on the subject of economic oppression as grounds for equitable relief from judgment would resolve the split of opinion between this California Court of Appeals decision and other California decisions such as the

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[52] *Hoversten v. Superior Court* (1999) 74 Cal.App.4th 636, 643-644.

[53] *Id.*, at 640.

Hoversten decision, and alert all state and federal courts, as to whether a economic and legal impediments that keep a party out of court completely qualify as a sufficient excuse for the failure to defend the initial court action under *Throckmorton*. All state and federal courts essentially follow *Throckmorton,* so a decision in this case would provide guidance to every court in the land and affect many cases.

In the instant case, much as in *Dei Tos*, Chow knew of CBG's legal and financial disability that kept CBG out of court *because they created the disability*!

Similarly, the Court of Appeal appears to have willfully ignored Currier's complaints about Saria, his incompetent legal counsel , by stating that Currier should have had Saria move to vacate the default judgment against CBG! Currier stated that Saria committed positive misconduct by failing to appear on behalf of CBG, and then failed to obtain relief from default on CBG's behalf. In fact, Currier obtained a $700,000.00 judgment against Saria for legal malpractice[54].

The Court of Appeals also dismissively stated, as noted above, that CBG failed to analyze the causes of action in the complaints, the causes of action tried, Currier and CBG's relationship, and potential res judicata and collateral estoppel issues[55]. That statement is not only patently

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[54]Appendix, Vol. I, 27a .

[55]Appendix, Vol. II, 66a.

false[56], is completely ignores the legal principle that "If the action is solely based upon the tortious conduct of the agent, judgments on the merits for the agent and against the principal, or judgments for varying amounts of compensatory damages, are erroneous[57]." The Court of Appeals also denied CBG's motion to augment the record on appeal with the reporters' transcript from the trial in *Chow v. Currier & CBG* with the excerpts of record that conclusively show all causes of action stated against CBG were either dismissed outright at the beginning of trial, or dismissed after the hearing of the evidence against Currier, the only CBG agent accused of any wrongdoing. All the causes of action against Currier except defamation were dismissed, and CBG was not a defendant to Chow's defamation cause of action[58].

This court has previously disapproved of legal maneuvering that allowed the person who ran a "one man" or "family" corporation to fraudulently escape judgment in *Pepper v. Litton*[59], where this

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[56]Appendix, Vol, I., 36a, Vol. II, 71a, n. 105..

[57]*Lathrop v. HealthCare Partners Medical Group* (2004) 114 Cal.App.4th 1412, 1423, citing Rest.2d Agency, §217 B, p. 472 [Ironically, *Lathrop* is the First District, Division Five's own opinion.]; see also *Bradley v. Rosenthal* (1908) 154 Cal. 420, 425 -427; *Shaw v. Hughes Aircraft Co.* (2000) 83 Cal.App.4th 1336, 1347.

[58]See Motion for Reconsideration, Reply in Support of Motion to Augment Record, Appendix, Vol II, 83a, 84a, 87a, 92a.

[59](1939) 308 U.S. 295, 296-297, 301. The instant case also involved a bankruptcy fraud intended to enrich insiders at the expense of legitimate creditors, as noted in the Statement of the Case, *supra*.

Court overturned the Fourth Circuit's overruling of a bankruptcy court's decision to subordinate the wage claim of a corporate director to that of an outside creditor with a valid claim. The Court's decision was based on the fact that the director's claim was obviously fraudulent and intended to ensure that the corporation would have no assets with which to satisfy subsequent, valid claims against the corporation. As this Court noted, the equitable powers of the court "have been invoked to the end that fraud will not prevail, that substance will not give way to form, [and] that technical considerations will not prevent substantial justice from being done[60]." In *Pepper*, this Court refused to allow a "one man" corporation shield its one controlling shareholder from liability for fraud, since Litton's actions controlled the corporation. Petitioner asks that in this case, CBG, a corporation with only one active agent[61], Currier, not be held liable for actions Currier did not take, since Currier controlled CBG's actions. To allow the current judgment to stand is to allow form and procedure to trump actual justice, and to provide future practitioners of fraud a pattern with which to use the legal system to steal the assets of a corporation. Neither result is the aim of the American legal system.

The legal reasoning that underlies the California Court of Appeal's, and the trial court's decision in this case is erroneous. That faulty logic by the

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[60] *Id.*, 308 U.S. 295, at 305.

[61] The only other agent of CBG, director Ordell Conrad, was not accused of any wrongdoing in the complaints in 323391 or 323394.

California Court of Appeal presents a substantial risk of inconsistent judgments against corporations where their agents were found not liable in future cases.

To allow the decision to stand is to allow wrongdoer to take an inequitable judgment against a corporation with only one human officer, agent, or director, even where that natural person is exonerated of all liability, simply because the corporation and natural person did not possess the funds to hire a lawyer for the corporation. It would allow such judgments to stand *even when the reason the corporation had no funds to pay an attorney is because the party suing the corporation stole the corporation's assets!* This Court can and should overturn the California Court of appeal, so that justice may actually be done here, and in similar cases in the future.

CONCLUSION

For the reasons stated above, this Court should grant CBG's petition for a writ of certiorari to the California Court of Appeal, First District, Division Five.

Respectfully submitted,
WEISS & WEISSMAN, INC.

October 6, 2006 By: _____

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Supreme Court, U.S.
FILED
06-519 OCT 6 - 2006
OFFICE OF THE CLERK

No. 06A168

IN THE

SUPREME COURT OF THE UNITED STATES

PAUL TALCOTT CURRIER,
COMMUNICATION BRIDGE GLOBAL, INC.

Petitioner,

vs.

ROBERT CHOW,

Respondent.

On Petition for Writ of Certiorari to the First District California Court of Appeals, Div. Five

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI, VOLUME I

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TABLE OF CONTENTS

VOL. I:

Title	Page
Judgment by Court After Default in *Chow v. Currier & CBG*	1a - 3a
Statement of Decision in *Chow v. Currier& CBG.*	4a - 20a
Order Denying Defendant Communication Bridge Global, Inc.'s Motion for Relief from Default Judgment	21a-22a
Opinion of First District California Court of Appeal in A110455	23a-28a
California Supreme Court's Denial of CBG's Petition for Writ of Certiorari (S142357, A110455)	29a
Order Setting Aside And Vacating Judgments Against Defendants Paul Talcott Currier and Communication Bridge Global, Inc. In *CBUSA v. Currier & CBG*	30a-31a

Defendant Communication Bridge Global, Inc's Memorandum of Points and Authorities in Support of Motion for Relief from Judgment in *Chow v. Currier & CBG* 32a-36a

Declaration of Paul Talcott Currier In Support of Motion For Relief From Default Judgment 37a-39a

Defendant Communication Bridge Global, Inc.'s Reply Memorandum of Points and Authorities In Support of Motion For Relief From Judgment 40a-44a

VOL. II:

Title: Page:

Appellant's Opening Brief filed by CBG in Case No. A110455 ..... 45a-76a

Motion for Reconsideration of Order Denying Request for Judicial Notice and Motion to Augment Record on Appeal 77a-81a

Reply Brief in Support of Motion to Augment Record on Appeal; Memorandum of Points and Authorities; Reply Declaration of Jeffrey Marc Weiss in Support of Motion to Augment Record; Declaration of Paul Talcott Currier; Exhibits 82a-93a

VOL. II (continued):

Title:	Page:
California Supreme Court Order Remanding Currier Accusation Against Spohn to Calif. State Bar	94a
Constitutional Provisions Involved In this Case	95a

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F I L E D
San Francisco County Superior Court
FEB - 7 2003

GORDON PARK-LI, Clerk
BY: /s Philomena Dias
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO

ROBERT CHOW, Plaintiff, vs. PAUL TALCOTT CURRIER, COMMUNICATION BRIDGE GLOBAL, INC, and DOES 1-50, Defendants	)	Case No. CGC-01-323394 **JUDGMENT BY COURT AFTER DEFAULT** DATE: January 23, 2003
PAUL TALCOTT CURRIER, Cross-Complainant, vs. ROBERT MICHAEL CHOW, SYLVIA CHOW, RICHARD SCHNEIDER, VINCENT M. SPOHN, and DOES 1-100, Cross-Defendants.	)	TIME: 9:00 a.m. DEPT.: 218

This matter came on for hearing on January 23, 2003, before the Honorable LORETTA M. NORRIS, Judge presiding in Department 218, Michael J. Fish appearing as attorney for Plaintiff ROBERT CHOW, and it appearing that defendants COMMUNICATION BRIDGE GLOBAL, INC., and PAUL TALCOTT CURRIER having been regularly served with process, having failed to appear and answer the plaintiff's complaint filed herein, and the default of said defendants having been duly entered on January 17, 2002, and evidence having been introduced in open session of this Court:

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Plaintiff ROBERT CHOW recover from said defendants the sum of $350,000.00 [initialed "LN"] interest on said sum to the date in the sum of $-0-, and attorney's fees in the sum of $-0-, total of $350,000.00 [initialed "LN"], with plaintiffs costs and disbursements amounting to the sum of ["per cost memo" written by Loretta Norris], together with interest on said judgment as provided by law.

The Clerk is ordered to enter the judgment.

Dated: Feb. 7, 2003 [handwritten by Loretta Norris]

/s Loretta M. Norris
Judge of the Superior Court

Endorsed
FILED
San Francisco County Superior Court
JAN 24 2005

GORDON PARK-LI, Clerk
By: DAVID SWANSON
Deputy Clerk

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO
DEPARTMENT 613

ROBERT CHOW, Plaintiff,	)	Case no. CGC-01-323394
vs.	)	STATEMENT OF DECISION
PAUL TALCOTT CURRIER, et al., Defendants.	)	Cal. Rules of Court §232
AND RELATED CROSS-ACTION.	)	Hon. Ernest H. Goldsmith

This matter came on regularly for trial by the Court on November 2, 2004. Plaintiff Robert Chow ("Chow") was represented by Michael J. Fish, Esquire, of Fish & Snell, P.C.; defendant Paul Talcott Currier ("Currier") appeared in propria persona. Trial by the Court was held on November 2, 3, 4, 5,15, 16, 17, 29, and 30, 2004. At the conclusion of plaintiff Chow's evidence, the Court announced its tentative decision to grant judgment pursuant to Code of Civil Procedure section 631.8 for Defendant on all causes of action. The Court then heard additional argument from

Plaintiff. The Court advised the parties that the matter would be taken under submission, and if the Court adopted its tentative decision, evidence and argument by Defendant would be unnecessary. If the Court decided to change its tentative decision in favor of Plaintiff on any causes of action, Defendant would be given the opportunity to call witnesses and both sides would argue the case further. The Court has considered the oral and documentary evidence admitted at trial, as well as the briefs, memoranda, and arguments submitted to the Court. The Court issued its Tentative Statement of Decision on December 27, 2004. Plaintiff filed Objections to Proposed Statement of Decision pursuant to California Rules of Court 232(d), which the Court has read and considered. The Court issues its findings of fact and conclusions of law in this Statement of Decision.

BACKGROUND

This trial concerned eight causes of action relating to a failed start-up company called Communication Bridge USA, Inc. ("ComBridge"). Plaintiff Robert Chow alleged causes of action, which include: (1) Fraud and Deceit, (2) Negligence, (3) Negligent Misrepresentation, (4) Intentional Breach of Fiduciary Duty, (5) Constructive Fraud, (6) Negligent Breach of Fiduciary Duty, (7) Breach of Contract, and (8) Defamation.[1]

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[1]Defendant's cross-complaint was dismissed pursuant to the granting of Plaintiff's Motion to Strike.

Defendant Paul Currier met plaintiff Robert Chow in 1999. Chow was a teacher of telecommunications at several schools in the Bay Area. He was also employed by MCI Worldcom as a telecommunications specialist. Currier has a varied business background and sought to create a wireless communications company. Their mutual interests resulted in their entering into a business relationship to create a telecommunications start-up company. The initial officers, directors, and shareholders of ComBridge were Currier and Chow. Plaintiff Chow has over 20 years' experience in optical voice and data networks. According to his testimony at trial, plaintiff Chow anticipated working strictly in the technical operations of the company, while Defendant Currier would be responsible for the fundraising and routine operations. ComBridge was in the business of developing and deploying high speed wireless internet services, converged technology, IP telecommunications, e-commerce, and Web, WAN, and VPN services.

The complaint alleged various misrepresentations and omissions on the part of defendant Currier. Chow alleged that Currier represented that he would bring in millions of dollars from investors, and yet failed to bring in a single investor. Further, that defendant Currier represented to plaintiff Chow that he had a well-respected business background. According to Chow, defendant Currier withheld disclosure of numerous negative facts about his background. The negative facts cited are as follows: (1) felony drug conviction resulting in prison time, (2) allegations of spousal abuse, (3) past due child support payments, (4) bad credit history, (5) history of alcoholism, (6) outstanding liens from

the Internal Revenue Service, and (7) a sexual harassment case in United Stated Federal District Court.

Plaintiff Chow invested his own time and several hundred thousand dollars of his money into ComBridge in addition to his having solicited money from family and friends. Without full knowledge and disclosure regarding the background of his co-founder, plaintiff Chow claims that he was not properly informed of the risks of his investment. Plaintiff subsequently agreed during trial that, save the defamation claim, the crux of each remaining cause of action was solely that Defendant failed to specifically disclose that he served prison time for a felony drug conviction seventeen years ago. In summary, Chow's causes of action are based on two premises. First, he would not have co-founded ComBridge and invested money if he had known of Currier's background. Second, that Currier's background, once known, would have to be disclosed to prospective investors which would make it impossible to raise capital, resulting in the loss of his investment.

Plaintiff premised his defamation claim on a letter distributed to all the shareholders of ComBridge. According to Plaintiff, following a shareholders' vote that effectively removed defendant Currier from his position as CEO, Defendant maliciously distributed this libelous letter in an attempt to tarnish Chow's reputation, and accordingly, ruin the company.

Defendant Currier in response argued that the alleged defamation was privileged inasmuch as he was a corporate officer and had a duty to advise the shareholders of his suspicions and did so pursuant to privilege under Civil Code Section

47(c). Currier also asserted that he made the statements without malice, therefore, the defamation claim was not actionable. In opposing the remaining causes of action, Defendant claimed that Plaintiff failed to establish the requisite elements in each remaining allegation.

BURDEN OF PROOF

"Except as otherwise provided by law a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." California Evidence Code section 500. The rule in California is that "whatever facts a party must affirmatively plead, that party also has the burden of proving." Witkin, California Evidence, section 6. For Plaintiffs, these facts are the elements of each cause of action pleaded, and for Defendant, "the rule means that affirmative defenses cannot be raised by mere denial, but must be specifically pleaded." Id. Because this is a civil case, "burden of proof requires proof by the preponderance of the evidence." California Evidence Code section 115. Plaintiff bears this burden.

Although Defendant did not affirmatively plead his qualified privilege defense to the defamation claim, the Court granted his motion to amend his answer to include the affirmative defense. Under California Civil Code section 47(c), the "common interest privilege" immunizes a defendant who makes a statement to others on a matter of common interest so long as the statement is made without malice.

An exception to the requirement that the qualified privilege must be affirmatively pled may be invoked where a complaint alleges facts

indicating applicability of a defense. Crucy v. Gannet Company, Inc. (1988) 64 Cal.App.4th 356, 367. In the complaint, Plaintiff alleged libel in an annual report of shareholders. This allegation clearly suggested a qualified privilege defense. Further, in light of the fact that Plaintiff modified his defamation claim to include Exhibit 19, which contained the alleged derogatory statements, during the course of the trial, the Court found that allowing Defendant to amend his answer to include the qualified privilege defense imposed no prejudice on Plaintiff. In any event, defendant Currier still bears the burden of proving by a preponderance of the evidence that his statements were protected by qualified privilege.

QUESTIONS OF LAW

BAJI 12.35 sets out the essential elements required in a fraud claim. The essential elements of a claim of fraud by concealment are: (1) the defendant concealed or suppressed a material fact, (2) the defendant was under a duty to disclose the fact to plaintiff, (3) the defendant intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff was unaware of the fact and would not have acted as [he] did if [he] had known of the concealed or suppressed fact, (5) the concealment or suppression of the fact causes the plaintiff to sustain damage.

Constructive fraud is codified in Civil Code section 1573. Constructive fraud consists (1) in any breach of duty which, without an actual fraudulent intent, gains an advantage to the person in fault, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him; or (2) in

any such act or omission the law specifically declares to be fraudulent, without respect to actual fraud. Civil Code section 1573.

Plaintiff agreed that the crux of his fraud causes of action, as well as the others except the defamation claim, was that Defendant failed to disclose his drug conviction prior to entering into a business relationship with Plaintiff, thereby causing the loss of his investment as well as the investments of his friends and family. Currier advised Chow in November 2000, about seven months after incorporation, that Currier had suffered a felony narcotics convention [*sic*, probably should read "conviction"] for which he served an eighteen-month incarceration about fifteen years earlier. Throughout the trial, plaintiff Chow was asked to come forth with legal authority in support of the claim that this was actionable. He produced none. Plaintiff could cite no cases that allowed a business partner to recover damages for a failed business based solely on the nondisclosure by Defendant of a fact about his background.

Plaintiff initially cited Eddy v. Sharp (1998) 199 Cal.App.3d 858 for the proposition that Defendant had a duty to disclose his felonious background prior to entering into a business relationship with plaintiff Chow. In fact, Eddy says no such thing. Eddy involved a misrepresentation made by an insurance agent to policyholders regarding the scope of their coverage under a policy they purchased. First, nothing in Eddy touched on failure by the agent to disclose his background. Moreover, the language referenced by Plaintiff applies only to business *transactions* rather than the circumstances

relevant when entering into a business *relationship.*

Plaintiff ultimately relied on Stokes v. Henson, (1990) 217 Cal.App.3d 187, 197. In Stokes, plaintiffs were granted rescission of their investments because defendant violated Corporations Code provisions by commingling investor's funds with his own and for various misrepresentations and omissions, primarily his lack of knowledge and sophistication in commodities trading. The court ruled in favor of the plaintiffs primarily based on defendant's misrepresentations and omissions *involving the risk of the investments and his use of their investment money.* In other words, Stokes involved failure to disclose fraudulent *conduct* in managing the investments, rather than fraudulent inducement for failure to reveal background facts.

Although the Stokes court loosely refers to the defendant's background, it is only to establish the existence of a fiduciary duty. The plaintiffs allege that they "invested based solely on [defendant's] experience and success in the field." Id. at 194. However, the crux of the case is not that they relied on defendant's background without knowing all the facts, but instead that defendant commingled their assets with his own assets and failed to fully disclose the status and risk of their investments. Nothing in the opinion addressed whether defendant's background was accurately stated to the investors or fully disclosed. The references to defendant's background are made solely in opposition to defendant's appellate defense that he did not have a fiduciary duty to plaintiffs.

Finally, Plaintiff argues that People v. Smith, (1989) 215 Cal.App.3d 230 held that a felonious

background is a material fact that requires disclosure before soliciting investments. Smith was a criminal case in which an inexperienced investor held himself out as a financial advisor and misappropriated and commingled the funds of his client investors. The court ruled that the prior felony was not a material fact because it was reduced to a misdemeanor and was then subsequently expunged. Plaintiff Chow argued that the Court nonetheless acknowledged that had the crime been a felony, it would have to be disclosed. However, the Smith court expressly limited its determination as to whether a past felony is a material fact to the context of the Corporations Code section 25401. However, Corporations Code section 25401, as interpreted by the appellate court, does not cover "simple nondisclosure" or the mere nondisclosure of material facts; rather "§ 25401 covers only misstatements of material fact and those omission [*sic*] that render misleading the statements that were made in connection with the sale or purchase of securities." Tse v. Ventana Med. Sys. (2002) 297 F3d 210. In Bowden v. Robinson (1977) 67 Cal.App.3d 705, 717, the court reflected the same assessment of section 25401, that it does not apply to simple nondisclosure. Thus, none of the case law cited by Plaintiff confirms his interpretation of the law.

EXPERT WITNESSES

Plaintiff Chow called Vincent Spohn and Gianeonenico Rende to testify as to the duty to disclose a prior felony conviction when seeking investments. Both witnesses testified to a duty to

disclose in the financial industry, rather than between business partners.

Witness Vincent Spohn, Esquire, was called by Plaintiff. Mr. Spohn is a criminal defense attorney who states he provided legal services to ComBridge. He testified that Chow was upset at having invested money in ComBridge. He further offered his professional opinion that Currier had a duty to disclose his narcotics conviction to Chow at the outset of their relationship. It was unclear what, if any, basis or background Spohn had to qualify him to offer such an opinion and the Court assigns no weight to it.

Plaintiff called Gianeonenico Rende, an investment consultant, as an expert witness. Mr. Rende has impressive academic and professional credentials. He cited several rules promulgated by the Securities and Exchange Commission and the National Association of Securities Dealers. He testified that professionals in the financial industry are required to make disclosure of any negative factors in their backgrounds. He stated that the "overriding rule is full disclosure." His testimony was convincing that the better practice is to make full disclosure; however, he drew from financial industry examples, and provided no dispositive testimony that partners in a start-up were under an absolute or legal obligation to disclose. He acknowledged to not being an expert in the field of private financial placements, which more nearly applies to the instant case.

Mr. Rende's most valuable testimony was his observations and opinions that the investment climate for start-up "hi-tech" ventures was very negative in 2000 and 2001, the relevant time period, and that the telecommunications industry

suffered from heavy overcapacity. The Court found Mr. Rende well-qualified to offer this evidence and his opinions. Mr. Rende's evidence and opinions were highly persuasive that the failure of ComBridge and the loss of Chow's investment in it may well have been largely or entirely due to maket and historical forces and nothing to do with nondisclosure by Defendant. There is strong factual support for this position in the instant case inasmuch as there was extensive evidence put forward by Chow that the flow of investment capital in this startup telecommunications venture ceased during this relevant period.

PLAINTIFF FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT ANY OF THE ALLEGED FRAUD CAUSED DAMAGES

Plaintiff does not establish the required showing to prevail on any of the first seven causes of action because he fails to demonstrate that the alleged nondisclosure caused any damages.[2]

Trial testimony revealed that the drug conviction did not cause difficulty in acquiring investments. The evidence presented by Plaintiff shows that the first concern from an investor stemmed from a sexual harassment suit involving the defendant found on a web search. The investor and Chow read the United States Federal District Court opinion. Based on the discovery of the

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[2]These causes of action include: (1) fraud and deceit, (2) negligence, (3) negligent misrepresentation, (4) intentional breach of fiduciary duty, (5) constructive fraud, (6) negligent breach of fiduciary duty, and (7) breach of contract.

lawsuit, the investor withheld further investment. Chow testified that he was horrified when he read Currier's federal case. Plaintiff attempts to argue that knowledge of this harassment suit prompted a further investigation into Defendant's background, revealing the felony conviction. Yet, the harassment lawsuit judgment that caused the investor to withdraw his investment, and which horrified Chow, conclusively established no wrongdoing by Defendant. In fact, defendant Currier was the *plaintiff* in that case. To be sure, although the sexual harassment suit mentioned an investigation into a sexual harassment against Currier, the court noted that this investigation was "without basis in fact." Currier v. Free Radio Europe, U.S.D.C. Court of Appeals No. 98-7020. Thus, the first investment allegedly withheld was was based on an incident where Defendant did nothing wrong, and was even vindicated by the federal appellate court. This investment was withheld not for failure to disclose the drug conviction, but from a different concern about a sexual harassment suite in which Mr. Currier was the suing party and without blame or culpability.

Further, Benson Chow, the only outside investor to testify, did not convince the Court that the felony conviction caused him to stop investing. Benson Chow testified that he would not have invested had he known of the felony. However, Benson Chow also said that he was told by plaintiff Chow that defendant Currier was in prison for four to five years, when in fact Currier served eighteen months. Benson Chow merely asked for Mr. Currier to take a less prominent role in the company. Finally, the Court finds Benson Chow's testimony was equivocal in regards to the prospects of future investment.

This Court does not reach the issue of whether the prior felony conviction is a material fact because Plaintiff failed to establish by a preponderance of the evidence that the nondisclosure caused damage. This Court does take notice that in arguing this failed disclosure was a material fact, no evidence whatsoever was proffered by Plaintiff that Currier's past felony was a crime of moral turiptude. The trial testimony showed that ComBridge was having difficulty acquiring investments prior to the disclosure by Defendant of his prior felony. In fact, the complaint in this case alleges that defendant Currier couldn't bring in any money prior to the disclosure. The Court took notice that at the time ComBridge was created, many startup communications companies were unable to attract investment capital as testified to by Mr. Rende. Further, entering into the wireless market is an endeavor fraught with obstacles such as opposition from city utility companies, difficulty obtaining permits, and numerous logistical problems, according to the evidence. It is in fact highly speculative that Plaintiff would have been able to raise enough money to get ComBridge up and running notwithstanding the disclosure issue.

The burden rests with Plaintiff to show that the delayed disclosure of the felony conviction directly caused ComBridge to lose out on an amount of investment needed for ComBridge to survive and save Chow's investment. No showing was made that, but for the late disclosure, ComBridge was on its way to success. Bald assertions by Plaintiff's attorney that the company was a good idea do not amount to a preponderance of the evidence

Although plaintiff Chow testified that he would not have invested in the company nor gone into business with defendant Currier had he known of the felony conviction, he did not demand that he get his investment back following the revelation. In fact, Chow *continued to invest.* The evidence indicated that the overwhelming majority of the money invested by plaintiff Chow was made *after* knowledge of Defendant's felony conviction was revealed. Plaintiff's concern that his family and friends would lose their investments had he not continued investing is considered by the Court but found to be unconvincing. The trial testimony suggests that plaintiff Chow and investors who were Chow's friends and family mobilized to depose Currier from his post as CEO with the intent of running the company which eventually fell into bankruptcy. The Court finds Chow's testimony lacking in credibility.

In 2001, when Communication Bridge USA was founded, many start-up companies did not succeed. In this investment climate, every investor and business partner takes on the risk that the startup business will fail. Plaintiff Chow testified as to the abilities and value of defendant Currier in starting the company. Indeed, Plaintiff conceded that without the complaint from the initial investor, he would have continued doing business with Defendant. In other words, the conduct of defendant Currier in his capacity as a director is not in question. Chow's testimony that he would not have joined Currier in this venture does not ring true. The Court finds that the blame fixed on Currier's nondisclosure by Plaintiff is a revisionist theory concocted by Chow. The Court further finds that Chow's causes of action based on -

nondisclosure have no substance or merit whatsoever.

PLAINTIFF'S DEFAMATION CLAIM IS BARRED BY QUALIFIED PRIVILEGE

The basis of Chow's defamation cause of action is Trial Exhibit 19, a letter sent by Currier to fellow shareholders in ComBridge on August 25, 2001. This was shortly after Currier was deposed as CEO and attempts were made by Chow and his investor relatives to cancel Currier's stock ownership. Currier testified he believed these acts were illegal. The letter included such statements as: Chow committed criminal fraud on the corporation; Chow defrauded Currier out of 10,000,000 shares of stock; Chow divulged intellectual property owned by ComBridge to his employer WorldCom and, Chow committed mail fraud. Defendant Currier amended his answer to include a defense of qualified privilege under Civil Code section 47(c). Civil Code section 47(c) states, "a privileged publication ... is one made ... in a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information." The Court finds that the letter was a disclosure to fellow shareholders on matters of common interest. See Cuenca v. Safeway Employees Federal Credit Union (1986) 180 Cal.App.3d 985. The matters referred to in the letter would not only be matters of common interest to the shareholders, but would be required

disclosures in the discharge of defendant Currier's fiduciary duty as an officer of the company.

Of course, as argued by Plaintiff, this defense is unavailable if a showing of malice is proven. Malice is defined as "motivated by hatred or ill will towards the plaintiff or *by a showing that the defendant lacked reasonable grounds for the belief in the truth of the publication and therefore acted in reckless disregard of the plaintiff's rights.*" (Emphasis added) Lundquist v. Heinz Reusser, (1994) 7 Cal.4th 1193, 1213.

The Court finds that the allegations made in the letter in question were made with a goo faith belief in the truth of the assertions. The Court further finds that a solid factual basis existed for Currier's beliefs in view of Chow's actions to cancel his stock and throw him out of the company. Defendant Currier, during testimony taken pursuant to Evidence Code section 776, convincingly testified that he believed at the time that plaintiff Chow was conspiring with other shareholders to wrest control of the company for the benefit of Chow's family and friends and that Chow was engaging in corporate voter fraud. Defendant Currier had contacted several law enforcement agencies prior to the distributio of the letter and is currently pursuing a lawsuit in Federal District Court against plaintiff Chow based largely on the allegations made in the letter.

Furthermore, the text of the letter includes numerous qualifications such as "I believe" and on the stand, defendant Currier persuasively testified that he stands by each allegation. This Court finds that Defendant proved by a preponderance of the evidence that, at the time he drafted the letter, he was making a privileged and good faith effort to warn fellow shareholders of possible impropriety

on the part of officers of ComBridge. The Plaintiff's defamation claim is without merit.

The Court finds and declares as follows:

CONCLUSIONS

1. The allegations arising from a failure to disclose negative facts regarding Defendant's background fail to establish by a preponderance of the evidence that the nondisclosure caused damage. Plaintiff has failed to come forth with any law and/or credible facts to convince the Court that Defendant's failure to disclose his background more likely than not caused damages to Plaintiff.

2. Further, the Court finds by a preponderance of the evidence that the defamation claim is precluded by Defendant's qualified privilege defense. The statements made in the letter circulated to shareholders was made to individuals with a common interest and without malice.

3. Judgment is for Defendant on all causes of action and against Plaintiff. Defendant is prevailing party and shall have costs of suit. All Defendant's costs which were waived pursuant to court order shall be paid to the Clerk of the Court by Plaintiff.

IT IS SO ORDERED. Let judgment be entered accordingly.

DATED: JAN 24 2005

/s

ERNEST H. GOLDSMITH
Judge of the Superior Court

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SUPERIOR COURT OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO
UNLIMITED CIVIL JURISDICTION

ROBERT CHOW *et al.*, Plaintiff, -vs.- PAUL TALCOTT CURRIER, COMMUNICATION BRIDGE GLOBAL, Inc., *et al.*. Defendants.	Case No. 01-323394 **ORDER DENYING DEFENDANT COMMUNICATION BRIDGE GLOBAL, INC'S MOTION FOR RELIEF FROM DEFAULT JUDGMENT**
PAUL TALCOTT CURRIER, Cross-Complainant, -vs.- ROBERT CHOW, SYLVIA CHOW, VINCENT SPOHN, RICHARD SCHNEIDER, *et al.*, Cross-Defendants.	Date: May 10, 2005 Time: 9:30 a.m. Dept.: 302 Judge : Hon. Ronald E. Quidachay Filed May 12, 2005

The above-captioned motion came on for hearing at the above-captioned time and date in

the above-captioned court. Jeffrey Marc Weiss of Weiss & Weissman appeared for Defendant Communication Bridge Global, Inc. ("CBG."). No appearance was made on behalf of Plaintiff Robert Chow. Upon review of the motion papers filed with the court, the documents in the case file, and the oral arguments of counsel for CBG, this court found as follows:

CBG was put on notice as early as August of 2001 that it was a defendant in the above-captioned action;

CBG's inability to hire legal counsel, even if caused by Plaintiff Robert Chow's economic oppression of Currier and CBG is not sufficient good cause for granting relief from judgment at this date;

The pleadings by Chow were against different entities, namely, Paul Currier and CBG, and therefore, a judgment in favor of Currier after trial is not inconsistent with a default judgment against CBG in Robert Chow's favor; and therefore,

IT IS HEREBY ORDERED THAT CBG's motion for relief from default judgment is DENIED.

Dated: May 12, 2005 By: /s

Hon. Ronald
Quidachay
Judge, Superior Court

Filed 2/28/06 Chow v. Communication Bridge Global CA 1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not cited for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT DIVISION FIVE

ROBERT CHOW,
Plaintiff and Respondent,

A110455
(San Francisco Co. Super.Ct. No. 323394)

v.

COMMUNICATION BRIDGE GLOBAL, INC.,

Defendant and Appellant

_____/

Communication Bridge Global, Inc., (CBG) appeals contending the trial court erred when it denied its motion to set aside a default judgment. We conclude the court did not abuse its discretion and will affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Robert Chow and Paul Talcott Currier formed CBG, a high-technology start-up company.

In August 2001, Chow filed a complaint against Currier and CBG. Some of the causes of action named Currier alone; others named Currier and CBG. The general thrust of the complaint was that Currier misrepresented his background and his business abilities in a way that was detrimental to Chow.

When Currier and CBG failed to file appropriate responses, Chow requested and obtained their defaults. On February 7, 2003, the trial court entered a default judgment against Currier and CBG for $350,000.

In April 2003, Currier, acting through an attorney, Ricardo Saria, filed a motion to set aside the judgment against him personally. The trial court granted the motion and vacated the judgment against Currier *only*.

In November 2004, the revived action by Chow against Currier proceeded to a court trial. At that point, Currier was proceeding in pro per. On January 24, 2005, the court issued a judgment and statement of decision in favor of Currier on all causes of action that had been tried.

Several months later, in April 2005, CBG filed a motion to vacate the default and default judgment that had been entered against it. It argued the February 2003 judgment should be set aside because it was obtained through "extrinsic fraud." The trial court conducted a hearing on CBG's motion and denied it.

II. DISCUSSION[3]

CBG contends the trial court erred when it denied its motion to vacate the February 2003 judgment.

Where, as here, a motion to set aside a default judgment is made more than six months after the judgment is entered, the motion is not directed to the court's statutory power to grant relief for mistake or excusable neglect (Code Civ. Proc., §473), but to the court's inherent equity powers. (*Orange Empire Nat. Bank v. Kirk* (1968) 259 Cal.App.2d 347, 352.) We review a lower court's ruling on such a motion under an abuse of discretion standard. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981.) The trial court's exercise of discretion must be considered in light of the strong public policy favoring finality: "[W]hen relief under section 473 is available, there is a strong public policy in favor of granting relief and allowing the requesting party his or her day in court. Beyond this period there is a strong public policy in favor of the finality of judgments and only in exceptional case should relief be granted." (*In re Marriage of Stevenot* (1984) 154 Cal.App.3d 1051, 1071.)

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[3]On September 12, 2005, while this case was being briefed, CBG filed a request that asked this Court to take judicial notice of the trial court's ruling on a motion to vacate in a different case. We deferred ruling on the request until the merits of the appeal. Having now considered CBG's request, we deny it. An appellate court can, but is not required to, take judicial notice of materials that were not presented to the trial court in the first instance. (*Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 325.) The court declines to take judicial notice of the document CBG has identified.

Equitable relief from judgment may be granted on grounds of extrinsic fraud or mistake. (*Kulchar v. Kulchar* (1969) 1 Cal.3d 467, 470-473.) "Extrinsic fraud occurs when a party is deprived of the opportunity to present his claim or defense to the court; where he was kept ignorant or, other that from his own negligence, fraudulently prevented from fully participating in the proceeding. ... The essence of extrinsic fraud is on party's preventing the other from having his day in court." (*City and County of San Francisco v. Cartagena* (1995) 35 Cal.App.4th 1061, 1067.) The term extrinsic mistake is used to describe situations in which circumstances extrinsic to the litigation have deprived a party of a hearing on the merits. (*Rappleyea v. Campbell*, *supra*, 8 Cal4th at p. 981.) The concept is applied most commonly when a party excusably neglects to appear and present a defense. "If such neglect results in an unjust judgment, without a fair adversary hearing, the basis for equitable relief is present . . . ." (*Kulchar v. Kulchar*, 1 Cal.3d at p. 471, italics omitted.)

Applying those principles in this case, it would be difficult to conclude CBG is entitled to relief on grounds of extrinsic fraud or mistake. CBG's primary theory on appeal is that the default judgment was entered because it lacked the funds necessary to hire an attorney to represent it. CBG lacked the necessary funds, it contends, because Chow had depleted its funds by filing a "frivolous" lawsuit. Thus, CBG seeks to set aside the judgment because of what it describes as "economic oppression." CBG has not cited any case that holds a judgment may be set aside on the grounds of "economic oppression" and it would be difficult to characterize "economic oppression" as either

"fraud" or "mistake" as those terms are commonly understood.

However, we need not base our decision on this grounds because CBG cannot prevail in any event. A party seeking to set aside a judgment based on extrinsic fraud or mistake must satisfy three elements. First, the party must demonstrate that it has a meritorious case. Second, the party must articulate a satisfactory excuse for not presenting a defense to the original action. Third, the party must demonstrate diligence in seeking to set aside the default once discovered. (*Rappleyea v. Campbell, supra,* 8 Cal.4th at p. 982.)

Here CBG attempts to satisfy the first element by noting that Chow made similar accusations against it and Currier. Since Currier prevailed, CBG contends that it would prevail too. However the fact that Currier prevailed does not necessarily mean that CBG also would prevail. To determine that question would require an analysis of the causes of action that were tried, the relationship between Currier and CBG, and possibly, issues of res judicata and collateral estoppel. CBG has not even attempted to analyze those issues[4]. An appellant has the burden of proving the trial court erred. (*Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979.) CBG has failed to carry its burden in this case.

Next, CBG contends it did not present a defense initially because it lacked the funds necessary to do so. While the evidence CBG cites on this point, declarations from Currier in which

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[4]CBG discusses some of these issues for the first time in its reply brief. We do not address issues that are raised in that fashion. (*Williams v. City of Belvedere* (1999) 72 Cal.App.4th 84, 92, fn. 2.)

he details the wrongs allegedly visited on CBG by Chow and others, are less than definitive, we will assume for purposes of this argument that CBG lacked the funds necessary to defend the suit.

The third factor, diligence, is clearly lacking. The record indicates the judgment at issue was entered in February 2003 and that CBG waited more than two years to file its motion to vacate. CBG does not suggest that it was somehow unaware of the judgment; the only excuse it provides for failing to file a motion earlier is tht it lacked the funds necessary to do so. However, CBG admits its interests were aligned with Currier, and Currier filed a motion to set aside the judgment less than two months after it was entered.

CBG has failed to explain why the attorney who filed the motion for Currier could not also have filed a motion for CBG. There was a lack of diligence here.

Thus, the evidence shows CBG failed to satisfy two of the three elements needed to set aside a judgment on the basis of extrinsic fraud or mistake. Under these circumstances, we conclude the trial court did not abuse its discretion when it denied CBG's motion.

III. DISPOSITION

The order denying CBG's motion is affirmed.

/s
Jones. P.J.

We concur:

/s
Stevens, J.

/s
Simons, J.

Court of Appeal, First Appellate District, Div. 5 -
No A110455
S142357

IN THE SUPREME COURT OF CALIFORNIA

En Banc

ROBERT CHOW, Plaintiff and Respondent,

v.

COMMUNICATION BRIDGE GLOBAL, INC.,
Defendant and Appellant

Petition for review DENIED.

SUPREME COURT
F I LE D

MAY 24, 2006

Frederick K. Ohlrich Clerk

DEPUTY

GEORGE
Chief Justice

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SUPERIOR COURT OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO
UNLIMITED CIVIL JURISDICTION

COMMUNICATION BRIDGE USA, INC. *et al.*,	Case No. 01-323391
Plaintiff,	**ORDER SETTING ASIDE AND VACATING JUDGMENTS AGAINST DEFENDANTS PAUL TALCOTT CURRIER AND COMMUNICATION BRIDGE GLOBAL, INC.**
-vs.-	
PAUL TALCOTT CURRIER, COMMUNICATION BRIDGE GLOBAL, Inc., *et al.*	
Defendants.	Date : May 11, 2005 Dept. : 301 Time : 9:30 a.m. [Entered May 11, 2005]

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the motion to set aside and vacate both default judgments taken in the above-captioned action against defendants PAUL TALCOTT CURRIER and COMMUNICATION BRIDGE GLOBAL, INC. is GRANTED as unopposed. No opposition was filed. SO ORDERED.

DATED : May 11, 2005 /s_____

Hon. James L. Warren
Judge, Superior Court

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Defendant *in propria persona*

SUPERIOR COURT OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO
UNLIMITED CIVIL JURISDICTION

ROBERT CHOW *et al.*, Plaintiff, -vs.- PAUL TALCOTT CURRIER, COMMUNICATION BRIDGE GLOBAL, Inc., *et al.*. Defendants.	Case No. 01-323394 **DEFENDANT COMMUNICATION BRIDGE GLOBAL, INC'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR RELIEF FROM DEFAULT JUDGMENT**
PAUL TALCOTT CURRIER, Cross-Complainant, -vs.- ROBERT CHOW, SYLVIA CHOW, VINCENT SPOHN, RICHARD SCHNEIDER, *et al.*, Cross-Defendants.	Date: May 10, 2005 Time: 9:30 a.m. Dept.: 302 Judge : Hon. Ronald E. Quidachay [Entered April 11, 2005]

I. INTRODUCTION

This memorandum of points and authorities is presented by Defendant COMMUNICATION BRIDGE GLOBAL, INC. ("CBG") in support of its motion for relief from the default judgment entered against it on January 17, 2002, in the above-

captioned action. This court has an inherent equitable power to set aside judgements that are inequitable and contrary to the interests of justice and the law. This is a case in which the Court should exercise that power, because the default judgment is inherently inequitable, having been obtained by "extrinsic fraud or mistake" and the positive misconduct of CBG's attorneys, and also because the default judgment against CBG is not consistent with the judgment in favor of Defendant PAUL TALCOTT CURRIER ("Currier") after trial.

II. ARGUMENT

A. The Judgment Was Obtained Through Extrinsic Fraud

This court has an inherent equitable power to vacate any judgment obtained through "extrinsic fraud or mistake." This power is not subject to the six-month limitations period set forth in C.C.P. §473; all a party seeking relief from judgment on the grounds of "extrinsic fraud" need show is that he, she, or it proceeded diligently upon discovery of the fraud. *Rappleyea v. Campbell* (1994) 8 Cal.4th 975 at 983-984.

This brings us to a discussion of what constitutes "extrinsic fraud or mistake." That term has been interpreted very broadly by California courts, in that "extrinsic fraud or mistake" means virtually any circumstance by which a party was deprived of a fair hearing; **there need be no actual fraud or mistake for a court to properly grant relief on these grounds!** *Marriage of Park* (1980) 27 Cal.3d 337, 342. In other words, Fraud or mistake is "extrinsic" is it deprived the party of its "day in court. Some examples of "extrinsic fraud" are "where the unsuccessful party has been prevented from exhibiting fully his case by fraud or deception practiced on him by his opponent, as in keeping him away from court by a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by

the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his interest to the other side." *Estate of Sanders v. Sutton* (1985) 40 Cal.3d 607, 614, quoting *United States v. Throckmorton* (1878) 98 U.S. 61, 65-66. Robert Chow, through his attorneys, Michael Fish and Thomas Mauriello, forced Paul Currier onto the street and into abject poverty, and further continued a three-year campaign of economic oppression against Currier, thereby putting the only remaining officer of CBG in a position where he could not effectively defend CBG's interests by hiring an attorney to represent the corporation. *Declaration of Paul Talcott Currier in Support of Motion For Relief From Default Judgment* ("Currier Dec."), filed herewith, at ¶2. It is well-established law that a corporation cannot appear in California Superior Court without legal counsel to represent it; that is, a corporation cannot appear "in propria persona" through its non-attorney officers. *Himmel v. City Council of Burlingame* (1959) 169 Cal.App.2d 97, 101. In addition, Currier's attorney, Vincent Spohn, corruptly sold out Currier's interests to Chow, as detailed below.

The breach of a fiduciary duty arising from a confidential relationship, may warrant such relief, even though the same actions, when taken in a non-fiduciary relationship, would **not** be considered extrinsic fraud. *Estate of Sanders*, supra, at 615. Even a confidential non-fiduciary relationship, where one party trusts the opponent (e.g., the opposing parties are friends or relatives), may be grounds for granting such relief, even though identical conduct between persons not having such a relationship would not constitute "extrinsic fraud." In the instant case, Vincent Spohn, an attorney who had represented Paul Currier used his "insider" knowledge and skills to attack Paul Currier by testifying on behalf of Chow and CBUSA

in this matter, as well as taking Currier's money and property, then failed to perform any services therefor, and by taking on legal representation of interests adverse to Currier. Currier Dec., at ¶3. Chow had a fiduciary relationship to CBG and CBUSA, and a further duty not to file frivolous lawsuits against CBG. Currier Dec., ¶4. Chow also forged proxies in the election in which he claimed to have been purportedly have been elected Chairman and CEO of CBUSA. *Id.* Spohn also participated in the collection and submission of forged proxies, Spohn's theft of Currier's corporate and personal property, and conspired with Chow against Currier. Currier Dec., ¶8.

Equitable relief is appropriate where a party has induced an opponent not to appear or not to contest the action by misrepresenting fact or making false promises, upon which the opposing party relies to his or her or its detriment. *Aheroni v. Maxwell* (1988) 205 Cal.App.3d 284, 292. In the instant case, Chow, Spohn, and Fish all misrepresented material facts in this case by lying to the San Francisco Superior Court and the San Francisco Sheriff's Department and the San Francisco Police Department in regard to (1) Currier's right to remain in his office suite and home domicile (they claimed he had no right to occupy the premises, when in fact, as CEO of CBUSA, Currier was free to spend as much time as he wished in CBUSA's offices), (2) Currier's alleged propensity to destroy CBUSA's property (they said he was violent and would be likely to destroy CBUSA's property), and (3) lied that Currier was not actually the CEO of CBUSA (Chow claimed he was the CEO when Currier was actually still the legitimate CEO), and the like. Currier Dec., ¶5.

B. Relief From Default is Proper Where, as Here, the Default Judgment Is Inconsistent with a Judgment Obtained From an Actual Trial on the Merits In the Same Case.

It is clear that where a default judgment is not consistent with a judgment reached against a co-defendant based on the same fact and law, and the defaulting party moves to vacate the default, the motion to vacate the default should be granted.

The complaint filed in this action states only facts alleging actionable conduct by Currier. Currier Dec., ¶6, Exhibit 1 to the Currier Dec. No one else is alleged to have taken any action harmful to the Plaintiffs on CBG's behalf. *Id.* The Plaintiffs took their case against Paul Currier in this action to trial and lost on all causes of action. See the *Statement Of Decision*, Currier Dec., Ex. 2, Currier Dec., ¶7. Since the facts supporting all the causes of action against Currier and CBG allege only conduct by Currier, and since a corporation can act only through its officers, directors, employees, or other agents who are natural persons, it follows that none of the causes of action against CBG have any evidentiary support, since the facts were found not to support any causes of action against Currier. *Id.* Since CBG could not possibly have been found liable for damages pursuant to any of the causes of action asserted against it, it would be both inequitable and against the interests of justice to allow the default judgment against CBG in the instant action to stand.

III. CONCLUSION

For the reasons stated above, Defendant's motion for relief from default judgment should be granted.

Respectfully submitted,
WEISS & WEISSMAN

Dated: April 6, 2005 By:/s
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Attorneys forDefendant
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Defendant *in propria persona* [*sic*]

SUPERIOR COURT OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO
UNLIMITED CIVIL JURISDICTION

ROBERT CHOW *et al.*, Plaintiff, -vs.- PAUL TALCOTT CURRIER, COMMUNICATION BRIDGE GLOBAL, Inc., *et al.* Defendants.	Case No. 01-323394 **DECLARATION OF PAUL TALCOTT CURRIER IN SUPPORT OF MOTION FOR RELIEF FROM DEFAULT JUDGMENT**
PAUL TALCOTT CURRIER, Cross-Complainant, -vs.- ROBERT CHOW, SYLVIA CHOW, VINCENT SPOHN, RICHARD SCHNEIDER, *et al.*, Cross-Defendants.	Date: May 10, 2005 Time: 9:30 a.m. Dept.: 302 Judge : Hon. Ronald E. Quidachay [Entered April 11, 2005]

I, Paul Talcott Currier, declare:

1. I am one of the defendants in the above-captioned matter. I have personal knowledge of the facts detailed herein, and if asked to do so, could testify competently about them.

2. In August of 2001, Robert Chow, through his attorneys, Michael Fish and Thomas Mauriello, forced me onto the street and into abject poverty, thereby putting me, the only remaining officer of

Communication Bridge Global, Inc. ("CBG") in a position where I could not effectively defend CBG's interests by hiring an attorney to represent the corporation.

3. In the instant case, Vincent Spohn, an attorney who had represented me in a domestic violence ("DV") matter, and whom I had hired to represent Communication Bridge USA ("CBUSA"), a subsidiary of CBG and a plaintiff in this case, whom I also paid and retained for an annulment by fraud matter, following the domestic violence matter, used his "insider" knowledge and skills to attack me by testifying on behalf of Chow and CBUSA in this matter, who stole my client trust account and trust property as a purported deposit towards his services in the preceding matters and did virtually no work in the DV matter and none in the annulment by fraud matter. Spohn failed to obtain any waiver of this obvious conflict of interest from me, for no clearly obvious reason on my part.

4. Chow, as my former business partner and a self-alleged co-founder of both CBUSA and CBG, had a fiduciary relationship to CBG and CBUSA, and had a further duty not to file frivolous lawsuits against CBG. Chow also forged proxies in the election in which he claimed to be purportedly elected Chairman and CEO of CBUSA.

5. In the instant case, Chow, Spohn, and Chow's attorney, Michael Fish ("Fish") all misrepresented material facts in this case by lying to the San Francisco Superior Court and the San Francisco Sheriff's Department and to the San Francisco Police Department in regard to (1) my right to remain in my office suite and home domicile (they claimed I had no right to occupy the premises, when in fact, as CEO of CBUSA, I was free to spend as much time as I wished in CBUSA's offices, which also served as my home and castle), (2) my alleged

propensity to destroy CBUSA's property (they said I was violent and would be likely to destroy CBUSA's property), and (3) lied that I was not actually the CEO of CBUSA (Chow claimed he was the CEO when I was actually still the legitimate CEO), and the like.

6. The complaint filed in this action states only facts alleging actionable conduct by me. A true and correct copy of the complaint filed in this action is attached hereto and hereby incorporated by reference as Exhibit 1. No one else is alleged to have taken any action harmful to the Plaintiffs on CBG's behalf.

7. The Plaintiffs took their case against me in this action to trial and lost on all causes of action. See the *Statement Of Decision* written by Judge Goldsmith, the trial judge, a true and correct copy of which is attached hereto and hereby incorporated as Exhibit 2. The facts were found not to support any causes of action against me.

8. I challenged the fraudulent June 28, 2001 CBUSA elections as (1) Spohn had a duty to tell me that I never had to call the election in the first place; (2) Chow and Spohn conspired to illegally set up the fraudulent election; (3) Spohn, as my paid counsel, lobbied all shareholder to vote for Chow, in secret to me behind my back; (4) Spohn and his partner verified and forged proxies (which I believe are in Judge Goldsmith's possession right now) to steal both corporations- CBUSA and CBG as well as my complete estate in criminal conversion and then file false bankruptcy to cover up these felonies; (5) I never resigned as Chairman of the Board of CBUSA.

Dated: April 11, 2005

/s_____
Paul Currier

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Attorney for Defendant
COMMUNICATION BRIDGE GLOBAL, INC.

SUPERIOR COURT OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO
UNLIMITED CIVIL JURISDICTION

ROBERT CHOW *et al.*,	Case No. 01-323394
Plaintiff,	**DEFENDANT COMMUNICATION BRIDGE GLOBAL, INC'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR RELIEF FROM DEFAULT JUDGMENT**
-vs.-	
PAUL TALCOTT CURRIER, COMMUNICATION BRIDGE GLOBAL, Inc., *et al.*	
Defendants.	
PAUL TALCOTT CURRIER, Cross-Complainant,	[Entered May 2, 2005]
-vs.-	
ROBERT CHOW, SYLVIA CHOW, VINCENT SPOHN, RICHARD SCHNEIDER, *et al.*, Cross-Defendants.	Date: May 10, 2005 Time: 9:30 a.m. Dept.: 302 Judge : Hon. Ronald E. Quidachay

I. INTRODUCTION

This memorandum of points and authorities is presented by Defendant COMMUNICATION BRIDGE GLOBAL, INC. ("CBG") in support of its motion for relief from the default judgment entered against it on January 17, 2002 [*sic*, should read "2003"], in the above-captioned action. This court has an inherent equitable power to set aside judgements that are inequitable and contrary to the interests of justice and the law. This is a case in which the Court should exercise that power, because the default judgment is inherently inequitable, having been obtained by "extrinsic fraud or mistake" and the positive misconduct of CBG's attorneys, and also because the default judgment against CBG is not consistent with the judgment in favor of Defendant PAUL TALCOTT CURRIER ("Currier") after trial.

Plaintiff ROBERT CHOW ("CHOW") has filed an opposition to the instant motion.based on the fact that no proposed answer was filed with the motion. CHOW also opposes this motion based on his assertions that CHOW did not commit any fraud that concealed this action's existence or the need to file a responsive pleading from CBG. Finally, CHOW opposes this motion on the grounds that CBG waited too long to file this motion.

II. ARGUMENT

A. CBG Has Met the Requirements For Setting Aside the Judgment

1. Chow's Economic Oppression of Currier Is "Extrinsic Fraud"

This court has an inherent equitable power to vacate any judgment obtained through "extrinsic fraud or mistake." This power is not subject to the six-month limitations period set forth in C.C.P. §473; all a party seeking relief from judgment on the grounds of "extrinsic fraud" need show is that

he, she, or it proceeded diligently upon discovery of the fraud. *Rappleyea v. Campbell* (1994) 8 Cal.4th 975 at 983-984.

This brings us to a discussion of what constitutes "extrinsic fraud or mistake." That term has been interpreted very broadly by California courts, in that "extrinsic fraud or mistake" means virtually any circumstance by which a party was deprived of a fair hearing; **there need be no actual fraud or mistake for a court to properly grant relief on these grounds!** *Marriage of Park* (1980) 27 Cal.3d 337, 342. In other words, Fraud or mistake is "extrinsic" is it deprived the party of its "day in court." The wrongful conversion of all of Currier's and CBG's assets by Chow was sufficient to place CBG in a position where it could not hire an attorney to represent it, and therefore, CBG could not participate in the litigation. See, generally, the *Declaration of Paul Talcott Currier in Support of Motion For Relief From Default Judgment* ("Currier Dec."), filed with the initial moving papers in this motion. For example, *McCreadie v. Arques* (1967) 248 Cal.App. 2d 239 the death or serious illness of counsel which prevents appearance at trial or a fair presentation of the cause may warrant setting aside the judgment where the circumstances could not have been prevented by due diligence.

Furthermore, Currier's attorney, Vincent Spohn, corruptly sold out Currier's interests to CHOW, as detailed in the Currier Dec., and in the moving papers. In fact, as stated in the initial motion papers, CHOW himself owed a fiduciary duty to Currier, which he breached, resulting in CBG's inability to file a timely responsive pleading in this case. CHOW also made several material misrepresentations of fact to this Court and to the San Francisco Police in order to force Currier out of 215 Leidesdorff Street in order to facilitate CHOW's theft of CBG's assets from the building.

The breach of a fiduciary duty arising from a confidential relationship, may warrant such relief,

even though the same actions, when taken in a non-fiduciary relationship, would **not** be considered extrinsic fraud.

2. CBG Has Met the Three Elements for Relief Under the Equitable Power

According to the case of *Gibble v. Car-Lene Research* (1998) 67 Cal.App.4th 295 - a party seeking relief under the Court's inherent equitable power to set aside unjust judgments after the six-month period for obtaining relief pursuant to C.C.P. §473 must satisfy three elements. The three elements are showing (1) the party has a meritorious case; (2) a satisfactory excuse for not presenting a defense in the original action, and (3) due diligence in seeking to set aside the judgment. In this case, CBG satisfies all three elements. CBG has a meritorious defense; namely, as stated below, that Currier has already successfully defended this case against CHOW, which is the basis for the motion for judgment on the pleadings which is Exhibit A to the *Declaration of Jeffrey Weiss In Support of Motion for Relief From Judgment* ("Weiss Dec."), filed herewith. Also, the allegations made against Currier are the same allegations made against CBG. The reason CBG did not present a defense was that CHOW's economic oppression of Currier and CBG made it impossible for CBG to defend itself. Finally, CBG moved for relief from judgment as soon as it had the financial means to hire Jeffrey Weiss as its legal counsel. As such, this Court can and should set aside the judgment.

B. Relief From Default is Proper Where, as Here, the Default Judgment Is Inconsistent with a Judgment Obtained From an Actual Trial on the Merits In the Same Case.

It is clear that where a default judgment is not consistent with a judgment reached against a co-

defendant based on the same fact and law, and the defaulting party moves to vacate the default, the motion to vacate the default should be granted. CHOW has not addressed this issue in his opposition, and has therefore admitted that CBG's position on this issue is correct.

To reiterate CBG's position on this issue, the complaint filed in this action states only facts alleging actionable conduct by Currier. Currier Dec., ¶6, Exhibit 1 to the Currier Dec. No one else is alleged to have taken any action harmful to the Plaintiffs on CBG's behalf. *Id.* The Plaintiffs took their case against Paul Currier in this action to trial and lost on all causes of action. See the *Statement Of Decision*, Currier Dec., Ex. 2, Currier Dec., ¶7. Since the facts supporting all the causes of action against Currier and CBG allege only conduct by Currier, and since a corporation can act only through its officers, directors, employees, or other agents who are natural persons, it follows that none of the causes of action against CBG have any evidentiary support, since the facts were found not to support any causes of action against Currier. *Id.* Since CBG could not possibly have been found liable for damages pursuant to any of the causes of action asserted against it, it would be both inequitable and against the interests of justice to allow the default judgment against CBG in the instant action to stand.

III. CONCLUSION

For the reasons stated above, Defendant's motion for relief from default judgment should be granted.

Respectfully submitted,
WEISS & WEISSMAN

Dated: May 1, 2005

By:/s_____
Jeffrey Weiss
Attorneys for Defendant
Communication
Bridge Global, Inc.

Supreme Court, U.S.
FILED
(3) (3)
No. 06A160 06-519 OCT 6 - 2006
IN THE OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

PAUL TALCOTT CURRIER,
COMMUNICATION BRIDGE GLOBAL, INC.

Petitioner,

vs.

ROBERT CHOW,

Respondent.

On Petition for Writ of Certiorari to the First District California Court of Appeals, Div. Five

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI, VOLUME II

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TABLE OF CONTENTS

VOL. I:

Title

Page

Judgment by Court After Default in *Chow v. Currier & CBG* ..... 1a - 3a

Statement of Decision in *Chow v. Currier& CBG.* ..... 4a - 20a

Order Denying Defendant Communication Bridge Global, Inc.'s Motion for Relief from Default Judgment 21a-22a

Opinion of First District California Court of Appeal in A110455 ..... 23a-28a

California Supreme Court's Denial of CBG's Petition for Writ of Certiorari (S142357, A110455) 29a

Order Setting Aside And Vacating Judgments Against Defendants Paul Talcott Currier and Communication Bridge Global, Inc. In *CBUSA v. Currier & CBG* 30a-31a

Defendant Communication Bridge Global, Inc's Memorandum of Points and Authorities in Support of Motion for Relief from Judgment in *Chow v. Currier & CBG* 32a-36a

Declaration of Paul Talcott Currier In Support of Motion For Relief From Default Judgment 37a-39a

Defendant Communication Bridge Global, Inc.'s Reply Memorandum of Points and Authorities In Support of Motion For Relief From Judgment 40a-44a

VOL. II:

Title: Page:

Appellant's Opening Brief filed by CBG in Case No. A110455 ..... 45a-76a

Motion for Reconsideration of Order Denying Request for Judicial Notice and Motion to Augment Record on Appeal 77a-81a

Reply Brief in Support of Motion to Augment Record on Appeal; Memorandum of Points and Authorities; Reply Declaration of Jeffrey Marc Weiss in Support of Motion to Augment Record; Declaration of Paul Talcott Currier; Exhibits 82a-93a

VOL. II (continued):

Title: Page:

California Supreme Court Order Remanding Currier Accusation Against Spohn to Calif. State Bar 94a

Constitutional Provisions Involved In this Case 95a

A110455

IN THE COURT OF APPEAL OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

ROBERT CHOW,

Plaintiffs,

vs.

PAUL TALCOTT CURRIER,
COMMUNICATION BRIDGE GLOBAL, INC.,

Defendants.

AND RELATED ACTIONS.

Appeal from the Superior Court, San Francisco County
Hon. Ronald Quidachay, Judge

APPELLANT'S OPENING BRIEF

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A011455

IN THE COURT OF APPEAL OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

ROBERT CHOW,

Plaintiffs,

vs.

PAUL TALCOTT CURRIER, COMMUNICATION BRIDGE GLOBAL, INC.,

Defendants.

AND RELATED ACTIONS.

APPELLANT'S OPENING BRIEF

I.INTRODUCTION

Defendant COMMUNICATION BRIDGE GLOBAL, INC. ("CBG") presents this brief in support of its appeal from the order denying its motion for relief from the default judgment entered against it on February 7, 2003, in the above-captioned action[5]. The order denying CBG's motion for relief from judgment was signed and filed on May 12, 2005[6]. This court has an inherent equitable power to set aside judgments that are

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[5] *Judgment by Court After Default*, Superior Court Case File ("SCCF") p. 348-349.

[6] *Order Denying Relief From Default Judgment*, SCCF p. 1274-1275.

inequitable and contrary to the interests of justice and the law. This is a case in which the Court should exercise that power, because the default judgment is inherently inequitable, having been obtained by "extrinsic fraud or mistake" and the positive misconduct of CBG's attorneys, Vincent Spohn ("Spohn") and Ricardo Saria ("Saria"), and also because the default judgment against CBG is not consistent with the judgment in favor of co-Defendant PAUL TALCOTT CURRIER ("CURRIER") after trial.

Plaintiff-Appellee ROBERT CHOW ("CHOW") filed an opposition to the motion to vacate the default, based on the fact that no proposed answer was filed with the motion[7]. CHOW also opposed the motion based on his attorney's assertions that CHOW did not commit any fraud concealing this action's existence or the need to file a responsive pleading from CBG[8]. Finally, CHOW opposed the motion on the grounds that CBG waited too long to file it[9]. None of those arguments had or have merit.

CHOW's entire lawsuit was a ruse concocted to strip CURRIER of his personal and intellectual property, as well as the assets of CBG and Communications Bridge USA, Inc. ("CBUSA."). Every claim CHOW asserted against CURRIER in this case was found by Judge Goldsmith of the San Francisco Superior Court to be wholly without merit, as discussed below[10]. For that reason, the decision Judge Quidachay, the law and motion judge in that court, not to vacate the default taken against CBG in the same case, based on the same facts, which were already adjudicated on the merits, makes no sense whatsoever, and must be reversed. Judge Quidachay's shameful abuse of discretion

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[7] *Opposition of Plaintiffs to Defendant Communication Bridge Global, Inc.'s Motion to Vacate Default Judgment*, SCCF pp. 1092 – 1095.

[8] *Id*, at 1093.

[9] *Id.*, at 1094.

[10] *Statement of Decision*, SCCF, pp. 938-951, p. 948, 950.

completely negates the principle that every case should be tried on its merits.

II. STATEMENT OF APPEALABILITY

The denial of a motion to vacate a judgment is an appealable order even where the time to appeal the judgment itself has lapsed[11]. The Notice of Appeal in this case was filed immediately after the entry of the order denying the motion to vacate the judgment against CBG in this case. As such, the notice of appeal was timely and this appeal is properly before this Court.

III. ARGUMENT

A. On a Motion to Vacate a Judgment the Standard of Review is "Abuse of Discretion."

The decision of whether to vacate judgment on grounds of fraud or mistake is within sound discretion of trial court and will not be reversed absent a clear abuse of discretion[12]. In other words, to prevail on appeal from an order denying a motion to vacate a default, the moving party must show that the trial court exceeded the bounds of reason, which is the test for abuse of discretion[13].

However the trial court's discretion to relieve a party from judgment or order on the basis of mistake, inadvertence, excusable neglect, is not unlimited and must be exercised in a manner consistent with the spirit of the law. In other words, the trial court's exercise of such discretion

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[11] *Howard v. Lufkin* (1988) 206 Cal.App.3d 297, 301.

[12] *Elston v. City of Turlock* (1985) 38 Cal.3d 227, 233; *Costa v. Traina* (1962) 200 Cal.App.2d 655, 662; *Rivercourt Co., Ltd. v. Dyna-Tel, Inc.* (1996) 41 Cal.App.4th 1477, 1480; *Scognamillo v. Herrick* (2003) 106 Cal.App.4th 1139, 1149.

[13] *Anastos v. Lee* (2004) 118 Cal.App.4th 1314, 1318-1319, *review denied.*

should serve the purposes of the law and substantial justice, not defeat them[14].

For the reasons explained below, the trial court abused its discretion in denying CBG's motion to vacate the default judgment against it. This Court should overturn the ruling by the trial court and either enter judgment for CBG, or remand the case to the trial court with instructions to grant the motion to vacate the default judgment.

B. The Trial Court Abused Its Discretion By Denying The Motion to Vacate the Judgment

1. Court Policy Favors Hearing on the Merits.

California court policy is that every case should be heard on the merits[15]. In other words, the policy of the law is that cases should be heard on the merits wherever possible[16]. As such, even one good ground to set aside default judgment will suffice[17].

For the reasons detailed more fully below, the trial court should have granted the motion to set aside the judgment in the instant case, because this case cries out for equitable relief.

2. The Court Ignored Multiple Grounds for Relief.

The Court ignored the fact that CBG was unable to appear without an attorney, and did not have the funds to hire such an attorney because of CHOW's

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[14] *Elston*, supra. See also, *Rivercourt*, supra.

[15] *Girard v. Monrovia School Dist.* (1953) 121 Cal.App.2d 737, 740.

[16] *Desper v. King* (1967) 251 Cal.App.2d 659, 664.

[17] *Kallman v. Henderson* (1965) 234 Cal.App.2d 91, 96.

wrongful acts[18]. The Court ignored the fact that CHOW lost at trial against CURRIER in this action, without CURRIER even having to present his case[19]! The Court ignored the fact that CBG was granted relief from default in this action's sister case, San Francisco Superior Court Case No. CGC-01-323391 ("Case No. 323391")[20]. The complaint alleged in Case No. 323391 was almost identical to the complaint in the instant case; every cause of action in Case No. 323391 was plead in the complaint filed in this action[21].

The court specifically ignored the valid grounds for relief presented to it by CBG. The order denying CBG's motion for relief from default stated, in relevant part:

> "CBG was put on notice as early as August of 2001 that it was a defendant in the above-captioned action;
>
> CBG's inability to hire legal counsel, even if caused by Plaintiff Robert Chow's economic oppression of Currier and CGB [sic] is not sufficient good cause for granting relief from judgment at this date;
>
> The pleadings by Chow were against different entities, namely, Paul Currier and CBG, and therefore, a judgment in favor of Currier after trial is not inconsistent with a

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[18] *Declaration of Paul Talcott Currier in Support of Motion For Relief From Default Judgment*, SCSF, pp. 1030-1072, at 1031-1032.

[19] *Statement of Decision*, SCSF, p. 938-951, at 950.

[20] See the *Request for Judicial Notice* filed with this Court at Exhibit 1.

[21] See Exhibits 1 and 2 to Exhibit A to *Defendant Communication Bridge Global, Inc.'s Reply Memorandum of Points and Authorities in Support of Motion for Relief From Default Judgment*. (the exhibits are attached to the *Declaration of Jeffrey Weiss in Support of Motion for Relief from Judgment*, which apparently was stapled to the back of the reply memorandum before filing) SCCF p. 1096-1175, at pp.1113-1159

default judgment against CBG in Robert Chow's favor; and therefore,

IT IS HEREBY ORDERED THAT CBG's motion for relief from default judgment is DENIED[22]."

B. CBG Has Met the Requirements for Setting Aside the Judgment

1. Economic Oppression Is "Extrinsic Fraud"

This court has an inherent equitable power to vacate any judgment obtained through "extrinsic fraud or mistake[23]." In other words, the court has equitable jurisdiction to vacate or modify a final judgment where extrinsic factors kept a party from presenting case to the court. That power exists so courts may remedy the absence of a fair adversary trial in such an action. The extrinsic factor need not be actual fraud, any disability that will definitely keep a party (such as imprisonment) from being able to defend his or her rights in court qualifies as a factor giving rise to extrinsic fraud or mistake[24]. Seizing all of a company's assets so it cannot hire a lawyer, as CHOW did to CBG, is a disability that will prevent it from defending itself in court[25].

---

[22] *Order Denying Defendant Communication Bridge Global, Inc.'s Motion For Relief From Default Judgment*, SCSF pp. 1275-1276, at 1276.

[23] 8 WITKIN CALIFORNIA PROCEDURE, ATTACKING THE JUDGMENT IN THE TRIAL COURT, (4TH ED. 1996) §§223, 231, PP 727, 741-742.

[24] *Humes v. Margil Ventures, Inc.* (1985) 174 Cal.App.3d 486, 499, *review denied*; C.C.P. §§328, 352, 352.1 [imprisonment, minority, insanity toll statutes of limitations]. *Hoversten v. Superior Court* (1999) 74 Cal.App.4th 636, 640.

[25] *Declaration of Paul Talcott Currier in Support of Motion For Relief From Default Judgment*, SCSF, pp. 1030-1072, at 1031-1032; *Case Management Statement*, SCCF p. 416-614, at pp.

2. This Court Can Grant Relief From "Extrinsic Fraud."

This power is not subject to the six-month limitations period set forth in C.C.P. §473; all a party seeking relief from judgment on the grounds of "extrinsic fraud" need show is that he, she, or it proceeded diligently upon discovery of the fraud[26]. In fact, motions to vacate a default judgment can be granted years after the default is entered[27].

This policy is also codified in California Code of Civil Procedure §1916[28], which states "Any judicial record may be impeached by evidence of a lack of jurisdiction in the court or judicial officer, of collusion between the parties, or of fraud in the party offering the record, in respect to the proceedings." A challenge to a judgment pursuant to C.C.P. §1916 may be made at any time, even after the judgment has long since become final, either by an independent suit in equity, or by motion in the original proceedings[29].

However, the power to vacate a judgment exists independently of the Code of Civil Procedure; it is an inherent equitable power of the Court[30]. The court possesses the power to vacate a judgment on the grounds of "extrinsic fraud" at any time

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425, 451-457.

[26] *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 983-984.

[27] See, for example, *Kallman,* supra, at 94, where a motion to vacate default entered in 1960 was granted in 1964.

[28] While C.C.P. §1916 was not mentioned in the motion for relief from default judgment, and some other legal issues may have been raised for the first time on appeal here, CBG respectfully notes that a party may raise a new legal theory on appeal as long as new theory applies only to the undisputed facts in the record. *Hoffman-Haag v. Transamerica Ins. Co.* (1991) 1 Cal.App.4th 10, 15-16. It is obvious that none of the facts applicable to this appeal are in dispute.

[29] *Hickey v. Roby* (1969) 273 Cal.App.2d 752, 768.

[30] *County of San Diego v. Magri* (1984) 156 Cal.App.3d 641, 646; *Necessary v. Necessary* (1962) 207 Cal.App.2d 780, 782; *Weitz v. Yankosky* (1966) 63 Cal.2d 849, 855.

following the entry of judgment, even years afterwards.

This brings us to a discussion of what constitutes "extrinsic fraud." That term has been interpreted very broadly by California courts, in that "extrinsic fraud" means virtually any circumstance by which a party was deprived of a fair hearing; **there need be no actual fraud or mistake for a court to properly grant relief on these grounds!**[31] Even in the absence of actual fraud, where a party can show it was denied its day in court by circumstances beyond its control on motion, a court will extend a liberal interpretation of "extrinsic fraud" to relieve a litigant from a default taken against it without a fair adversary hearing[32]. In other words, fraud is "extrinsic" if it deprived the party of its "day in court.[33]"

3. Even If the Economic Oppression Was Not "Extrinsic Fraud," It Qualifies as "Extrinsic Mistake."

As stated above, extrinsic fraud is not the only ground for allowing equitable relief from a judgment or order that is otherwise final and conclusive. In certain cases, the ground for relief is not fraud but rather the excusable mistake of the party that results in the party's failure to litigate a claim or defense[34].

To show extrinsic mistake, a party must show the entry of an unjust judgment without a fair adversary hearing[35]. In the instant case, it is clear that the judgment against CBG is both unjust and that there was no fair adversary hearing. That is because the judgment against CBG was not

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[31] *Marriage of Park* (1980) 27 Cal.3d 337, 342; *Estate of McGuigan* (2000) 83 Cal.App.4th 639, 649-650 as modified on denial of rehearing. See also *Hoversten*, supra, at 640.

[32] *Corey v. Weerts* (1963) 214 Cal.App.2d 416, 422.

[33] *Id*, see also *Marriage of Modnick* (1983) 33 Cal.3d 897, 905.

[34] *In re Estate of Beard* (1999) 71 Cal.App.4th 753.

[35] *Id.*

consistent with the judgment in favor of CURRIER, CBG's sole agent in all causes of action in the same case. Obviously, there was also no adversary hearing because the judgment was by default.

Extrinsic mistake is available as a ground for relief from an order or judgment where the party cannot show extrinsic fraud, but has shown excusable neglect, hardship, or other grounds for the failure to press a claim or defense[36]. In this case, CBG was unable to appear because there were no funds to pay for an attorney to represent CBG in court, as Defendants stole, seized and looted CBG's assets, and forced the only legitimate officer, employee, and agent of CBG, CURRIER onto the street and into abject and total poverty. For the reasons stated above, "extrinsic mistake" could and should have been used by the trial court as grounds to vacate the default judgment against CBG.

Failure to litigate a claim based on the promise of the other party, where the promise is later breached, is grounds for relief based on extrinsic mistake[37]. In the instant case, CHOW made promises to both the shareholders of CBG and CBUSA, promises that he would pay CURRIER back wages, which in fact, CHOW owed him for work performed from October of 2000 until August 8, 2001, when CURRIER was illegally evicted, by and through CHOW's agents from his office suite in which he was living, because CHOW had refused to continue to pay the agreed-upon apartment allowance for CURRIER[38].

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[36] *Id.*

[37] *Beard*, supra.

[38] CURRIER's Case Management Statement, filed January 2, 2004, Attachment numbered 21, p. 53, ¶ 313. SCSF at p. 469, ¶313. See also, the same attachment at ¶¶245, 247, 286-289, 294, and 295 (pp. 514-515, 522-523) for other promises CHOW made to CURRIER regarding the establishment, funding, and running of CBUSA and CBG that CHOW had no intention of honoring.

4. A Party's Incapacity Is Grounds for Equitable Relief as "Extrinsic Mistake."

The incapacity of a party or its legal counsel is sufficient to establish "extrinsic mistake" in cases that may not r e to the standard of "extrinsic fraud[39]." In case this Court finds that the frauds of CHOW are not sufficient, this Court has a separate ground on which to grant relief, that of "extrinsic mistake."

Where a party to an action is incapacitated to the extent that he or she cannot understand his or her rights and/or cannot act upon them, a judgment obtained against that party may (and should) be reversed on the grounds of extrinsic mistake. For example, in the case of *Olivera v. Grace*[40], the California Supreme Court found that a judgment quieting title against a woman during the time that she had suffered a traumatic head injury but had not yet been ruled legally incompetent could be vacated upon motion by the woman's administrator. Similarly, in *Dei Tos v. Dei Tos*[41], the court found that a woman's obtaining a divorce from her husband during a period of insanity was also reversible under the "extrinsic mistake" doctrine. The *Dei Tos* court noted:

> Whether this was by fraudulent design or by mere mistake or inadvertence on the part of the plaintiff makes no difference. The principle of the law involved is that, through no fault of his, this defendant was not permitted to participate in the proceedings[42].

Finally, in *Watson v. Watson*[43], a California Court of Appeals noted that a Japanese national

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[39] WITKIN, *supra*, at §232, p. 742.
[40] (1942) 19 Cal.2d 570, 578.
[41] (1951) 105 Cal.App.2d 81, 85.
[42] *Id.*
[43] (1958) 161 Cal.App.2d 35, 39

with limited knowledge of the English language could vacate the divorce decree obtained by her husband, a U.S. national who had brought her to California after their marriage on the grounds of her affidavit stating a lack of knowledge of English and of the legal significance of the papers served on her by her husband, also on grounds of "extrinsic mistake." The court's rationale was that, even in the absence of fraud,

> [i]t does appear that she [the Japanese woman] had fairly valuable property rights to protect and plaintiff [the U.S. national] acquired those rights by what might reasonably be said to amount to her ignorance, mistake, or inadvertence, without an opportunity on her part to be present, and without a *fair adversary hearing*[44].

For example, in *McCreadie v. Arques*[45] the court held that the death or serious illness of counsel which prevents appearance at trial or a fair presentation of the cause may warrant setting aside the judgment where the circumstances could not have been prevented by due diligence. The wrongful conversion of all of CURRIER's and CBG's assets by CHOW was sufficient to place CBG in a position where it could not hire an attorney to represent it, and therefore, CBG could not participate in the litigation[46]. CHOW's wrongful

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[44] *Id.*

[45] (1967) 248 Cal.App. 2d 39, 45. See also *Jeffords v. Young* (1929) 98 Cal.App.400, 405 [death of attorney and erroneous advice from assisting attorney that case had been continued were grounds for relief from judgment]; *Antonsen v. Pacific Container Co.* (1941) 48 Cal.App.2d 535,539. [relief granted where attorney suspended and allowed default judgment to be taken without notice to client].

[46] See, generally, the *Declaration of Paul Talcott Currier in Support of Motion for Relief from Default Judgment* ("Currier Dec."), filed with the initial moving papers in that motion.

acts towards CBG could not have been prevented by due diligence, and are analogous to the sudden illness or death of a party's attorney, since CBG was unable to hire legal counsel because of CHOW's actions.

5. The Positive Misconduct of a Party's Attorney is Grounds for Relief Based on "Extrinsic Mistake."

In the instant case, CBG's own legal counsel, Spohn, conspired with CHOW to steal CBG's assets[47]. Spohn even testified against CURRIER on CHOW's behalf at the trial in Case No. 323394[48]. It is black-letter law that when a party's own legal counsel "corruptly sells out his client's interest to the other side," the judgment may be overturned either on the grounds of extrinsic fraud[49].

Successive court decisions based upon *Throckmorton* have expanded that doctrine to the point that an attorney's positive misconduct also gives rise to relief from judgment on the grounds of "extrinsic mistake." Where an attorney utterly fails to take any action to represent his or her client, the client may obtain relief from a judgment taken against the client on those grounds[50]. See, for example, *Orange Empire Nat. Bank. v Kirk*[51], in which the attorney representing a person sued by a bank based on forged guaranty never presented a defense based on his client's signature being forged and never moved to vacate the default. The Court of Appeals reversed the order denying Kirk's successor attorney's motion for relief from default, which was filed after the 6-month C.C.P. §473

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[47] *Case Management Statement*, SCCF p. 416-614, at pp. 451-457.

[48] *Statement of Decision*, SCCF pp. 938-951, at 945-946.

[49] *United States v. Throckmorton* (1878) 98 U.S. 61, 65.

[50] WITKIN, *supra*, at §235, p. 747-748.

[51] (1968) 258 Cal.App.2d 347, 354-355.

period based on the grounds that that Kirk's prior attorney's negligence was so gross as to constitute "actual misconduct[52]." See also *Aldrich v. San Fernando Valley Lumber Co.*[53] in which an attorney's being suspended by the State Bar without notifying his client, and the resultant failure to answer interrogatories or oppose a motion to dismiss, constituted "positive misconduct" by the attorney warranting relief. As such, even if this Court finds, or the trial court found, that Spohn's taking the position of the party suing CBG and actually testifying against CURRIER in court was not "extrinsic fraud," it was certainly "extrinsic mistake," since Spohn obviously did nothing to help CBG defend itself in this matter.

Furthermore, the completely inept handling of CURRIER's case by attorney Saria caused CURRIER's cross-complaint and the incompetently-written *First Amended Cross-Complaint* to be stricken, including the claims CURRIER attempted to file on CBG's behalf[54]. Saria's later incompetence caused the trial court to deny him permission even to file a second amended cross-complaint to replace the grossly inadequate first amended cross-complaint he prepared on CURRIER's behalf[55]. Saria admitted to his ineptitude causing a default to be taken against CURRIER and that the failure

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[52] *Id.*

[53] (1985) 170 Cal.App.3d 725, 738.

[54] See, *Order Granting Motion to Strike First Amended Cross-Complaint*, SCCF pp. 307-308, at 308, noting that no opposition was filed, and that CURRIER appeared "without his counsel, Ricardo C. Saria."

[55] *Notice of Motion and Motion For Orders to Vacate Default Judgment; For Leave to File Second Amended Answer; And For Leave to File Second Amended Cross-Complaint*; SCCF, pp. 324-338, *Order After Hearing on Motion to Vacate Default and Default Judgment*, SCCF p. 388-389, at p. 389. *First Amended Cross-Complaint*, SCCF, p. 268-270.

to timely file a cross-complaint was his fault[56]. Saria took no further action in Case No. 323394, except to withdraw as CURRIER's legal counsel, and took no action on behalf of CBG, despite Saria's agreement and obvious duty to represent CBG as well as Currier[57].

6. The Judgment Should Be Overturned on Duress Grounds.

A judgment obtained by duress can be grounds for relief from a final judgment[58]. For example, a California Court of Appeal reversed an order denying a motion to vacate a marital settlement agreement incorporated into a judgment based on the wife's claim that her husband coerced her into signing it[59]. The Court of Appeal reversed the judgment for a determination from the trial court as to whether the settlement agreement was agreed to under duress or not, given the unequal nature of the settlement, the fact that the settlement was hurriedly drafted, and the husband's history of violence[60].

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[56] *Notice of Motion and Motion for Orders to Vacate Default Judgment; For Leave to File Second Amended Answer; And, For Leave to File Second Amended Cross-Complaint*, SCCF 324-338, at 328-330.

[57] See, generally, the entire case file, for the fact that Saria never substituted in as CBG's counsel and took no legal action to defend CBG. It would have made no sense for Saria to represent CURRIER but not CBG, since a default against CBG would basically become CURRIER's responsibility, because CURRIER was the only remaining officer, employee, and one of the few remaining legitimate shareholders of CBG, not to mention the damage that a default judgment against CBG would do to CURRIER's case. See California Rule of Professional Conduct Rule 3-110(A) (duty of competent representation).

[58] WITKIN, *supra*, at §236, pp. 748-749.

[59] *Marriage of Brockman* (1987) 194 Cal.App.3d 1035.

[60] *Id*, at 1047.

In a subsequent case, *Marriage of Baltins*[61], the Court of Appeal held that the strict definition of "duress" under Civil Code §1569[62] had been "relaxed" and that under the modern rule, "duress" may take the form of "threats, importunity, or any form of mental coercion[63]" and it is shown where a party willfully used threats or pressure to induce another party to act or refrain from action, to the other party's harm[64]. The courts examine the effect of the threats or exhortations upon the affected party's mind, rather than the nature of the threats or exhortations themselves[65].

In *Baltins*, the wife was emotionally vulnerable, distraught, and could not deal with her husband effectively on an "arms-length" basis during their divorce[66]. The *Baltins* court noted that

> [The husband] actively interfered with her obtaining legal assistance and conducted himself in a manner calculated to deprive [the] Wife of representation by counsel... Ultimately, when Wife signed the agreement from which the trial court granted her relief, she was not represented by counsel[67].

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[61] (1989) 212 Cal.App.3d 66, 84.

[62] Civil Code §1569 states: " Duress consists in:

1. Unlawful confinement of the person of the party, or of the husband or wife of such party, or of an ancestor, descendant, or
adopted child of such party, husband, or wife;

2. Unlawful detention of the property of any such person; or,

3. Confinement of such person, lawful in form, but fraudulently
obtained, or fraudulently made unjustly harrassing [sic] or oppressive."

[63] WITKIN, *supra*, at §236, p. 750.

[64] *Baltins*, supra, at 84.

[65] *Id.*

[66] *Id.*

[67] *Id.*, at 85.

CHOW acted in such a way as to deprive CBG of counsel (i.e., stealing its assets) in order to obtain a default judgment against CBG.

It is interesting to note here that CHOW's having CURRIER arrested using a fraudulently-obtained and expired restraining order fits C.C. §1569's definition of "duress[68]." Furthermore, CURRIER was separated from his property, as CBG was from its property and assets, when the fraudulently-obtained restraining order against him was executed by agents of CHOW (e.g. attorneys Thomas Mauriello, Michael Fish)[69]. For this reason, the judgment against CBG could and should have been overturned by the trial court on the grounds of duress.

C. CBG's Delay In Seeking Vacation of the Judgment Was Reasonable and the Vacation Will Not Prejudice CHOW.

1. This Court Can Grant Relief Years After a Judgment.

The inability of a party to hire legal counsel in order to mount a legal defense, caused by that party's indigence, has been recognized as grounds for vacating a judgment, even long after the six-month period for reconsideration under C.C.P. §473(b) or 473.5(a)[70], despite the doctrine of laches. The doctrine of laches is based on the idea of a party's being foreclosed from raising a claim or defense where the party wishing to assert the claim or defense was unreasonably dilatory in doing so and thereby caused prejudice to the opposing party.[71] In the case of *County of Ventura v. Tillett*, the Court of Appeal found that "Persons who settle

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[68] *Declaration of Paul Talcott Currier in Support of Motion For Relief From Default Judgment*, SCSF, p. 1030-1072, at 1031.
[69] *Id.*
[70] *County of Ventura v. Tillett* (1982) 133 Cal.App.3d 105, 114.
[71] *Fountain Valley Regional Hospital & Medical Center v. Bonta'* (1999) 75 Cal.App.4th 316, 323-324.

their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard[72]."

In *Tillett*[73], the defendant was an indigent woman who entered into a stipulation with the local district attorney's office in a welfare and child support matter without the opportunity to seek the advice of legal counsel. The appellate court found that the woman was not guilty of laches in waiting more than a year and a half before moving to have the judgment vacated, since she was quick to obtain legal counsel once she was found guilty of contempt, and the district attorney's office could show no prejudice from the delay, and the test for granting or denying a motion to vacate a judgment is the reasonableness of the moving party's delay, measured against the prejudice to the nonmoving party[74].

In the instant case, not only was CBG denied the opportunity to seek legal counsel as a result the Defendants' actions; *CBG was prevented from mounting any sort of legal defense on its own behalf, through no fault of its own!* A corporation is a legal person. It has the same right to defend itself in court as a natural person[75]. However, a corporation cannot appear in court unless it is represented by a licensed attorney. The corporation's non-attorney agents and officers cannot appear for the corporation "*in propria persona*.[76]"

Finally, the point of *Tillett* was that even in a civil lawsuit, where a person is faced with the

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[72] *Id.*, citing *Boddie v. Connecticut* (1971) 401 U.S. 371, 377.
[73] *Id.*
[74] *Id.*, at 115, citing *Marriage of Park*, supra, at 345.
[75] *American Alternative Energy Partners II v. Windridge, Inc.* (1996) 42 Cal.App.4th 551, 559; *Friendly Village Community Ass'n, Inc. v. Silva & Hill Construction Co.* (1973) 31 Cal.App.3d 220, 224.
[76] *CLD Construction, Inc. v. City of San Ramon* (2004) 120 Cal.App.4th 1141, 1145; *Tom Thumb Glove Co. v. Han* (1977) 78 Cal.App.3d 1,3.

awesome power of the State, even a stipulated judgment is subject to vacation if that party is not represented by counsel[77], because of the massive disparity in bargaining power and legal skill between state, local, or federal government and an unrepresented indigent. It follows that an indigent corporation that cannot appear because it is not represented by counsel should be able to seek similar equitable relief. This is especially true when dealing with a judgment obtained against it by an extremely wealthy individual who caused the corporation to become insolvent in the first place[78].

Where a party can show that circumstances beyond that party's control conspired to keep that party out of court, the court should to vacate the default judgment against that party. See, for example, *Hoversten v. Superior Court*[79], in which a prisoner who was unable to appear and present his argument in a child custody case by virtue of his being imprisoned was entitled to the custody order issued in his absence being vacated pending a new hearing on the matter. In this case, CBG's insolvency kept it from being able to secure counsel[80]. The actions of CHOW caused CURRIER and CBG to be insolvent, as they fraudulently took all of CBG's assets, leaving CBG with no resources with which to procure legal counsel. Thus, the doctrine of equitable estoppel, or something analogous to it, applies here. As the California Supreme Court stated in *Lantzy v. Centex Homes, Inc.*:

> Equitable estoppel, however, . . . comes into play only after the limitations period has run and addresses . . . the circumstances in which a party will be estopped from

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[77] *Tillett*, supra, at 114-115.

[78] *Declaration of Paul Talcott Currier in Support of Motion For Relief From Default Judgment*, SCSF, p. 1030-1072, at 1031-1032.

[79] (1999) 74 Cal.App.4th 636, 640.

[80] *Case Management Statement*, SCCF pp. 416-614, at pp. 425, 451-457.

> asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forbearing suit within the applicable limitations period. [Equitable estoppel] is wholly independent of the limitations period itself and takes its life . . . from the equitable principle that no man [may] profit from his own wrongdoing in a court of justice.[81]

Similarly, the Appellees should not be allowed to profit from their own fraud, misrepresentations, theft, forgery and oppression in this, or any other, court of justice by taking a default against an innocent defendant that cannot defend itself as a result of their wrongdoing.

As stated in the recent case of *Falahati v. Kondo*[82],

> Because plaintiffs knew or should have known they procured their default against [the defendant] in violation of [its] statutory and constitutional rights their claim to prejudice if the default and subsequent judgment are nullified are substantially weakened. Conversely, the fact that the default was procured against [the defendant] not because of some mistake or neglect on his part, but because he was denied [its] statutory and constitutional right to be heard substantially strengthens [its] entitlement to equitable relief.

In the *Kondo* case, the plaintiffs were charged with the knowledge that adding defendant Kondo's name to the caption of their third amended complaint (by way of errata notice) without stating

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[81] (2003) 31 Cal.4th 363, 382, citing *Battuello v. Battuello* (1998) 64 Cal.App.4th 842 , 847-848, quoting *Bomba v. W. L. Belvidere, Inc.* (7th Cir. 1978) 579 F.2d 1067, 1070.

[82] (2005) 127 Cal.App.4th 823, 834

any cause of action against him, and then had a default entered against him the same day, effectively depriving Kondo of the chance to defend himself against the allegations against him.

In any event, the facts of any case in which equitable relief from judgment is sought will determine whether or not such relief is granted; that is courts have to evaluate these cases on an individual basis[83]. In the instant case, the record shows that CHOW and his attorneys acted to place CURRIER, CBG's only officer or director, onto the street, by filing false police reports against him, and stripped CBG of its assets in an illegal seizure of the assets of CBG, CBUSA, CURRIER, and the assets of several corporate entities run by CURRIER.

Furthermore, CURRIER's attorney, Spohn, corruptly sold out CURRIER's interests to CHOW[84]. In fact CHOW himself owed a fiduciary duty to CURRIER, which he breached, resulting in CBG's inability to file a timely responsive pleading in this case[85]. CHOW also made several material misrepresentations of fact to this Court and to the San Francisco Police in order to force CURRIER out of 215 Leidesdorff Street in order to facilitate CHOW's theft of CBG's assets from the building[86].

The California Supreme Court has repeatedly ruled that the breach of a fiduciary duty arising from a confidential relationship is extrinsic fraud warranting such relief, even though the same actions, when taken in a non-fiduciary relationship, would **not** be considered extrinsic fraud[87]. As the California Supreme Court ruled in *Estate of*

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[83] *Galper v. Galper* (1958) 162 Cal.App.2d 391, 396.

[84] *Declaration of Paul Talcott Currier in Support of Motion For Relief From Default Judgment*, SCSF, pp. 1030-1072, at 1031-1032; *Case Management Statement*, SCCF pp. 416-614, at pp. 451-457.

[85] *Id.*

[86] *Id.*

[87] *Estate of Sanders* (1985) 40 Cal.3d 607, 615.

Sanders, "Courts are particularly likely to grant relief from a judgment where there has been a violation of a special or fiduciary relationship[88]." As detailed above, the relationship between Spohn, CURRIER, and CBG was a fiduciary relationship, as Spohn was the legal counsel for both CURRIER and CBG at the times relevant to this action. In addition, Saria utterly failed as the legal counsel for CURRIER and CBG in case no. 323394[89], as described above, due to his adjudged gross malpractice[90].

2. CBG Has Met the Three Elements for Equitable Relief

According to the case of *Gibble v. Car-Lene Research,*[91] a party seeking relief under the Court's inherent equitable power to set aside unjust judgments after the six-month period for obtaining relief pursuant to C.C.P. §473 must satisfy three elements. The three elements are showing: (1) the party has a meritorious case; (2) a satisfactory excuse for not presenting a defense in the original action; and (3) due diligence in seeking to set aside the judgment. In this case, CBG satisfies all three elements. CBG has a meritorious defense: namely, as stated below, that CURRIER has already successfully defended this case against CHOW, which is the basis for the motion for judgment on the pleadings filed in this action[92]. Also, the

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[88] *Id.*

[89] *Request for Sanctions Due to Negligence Against Ricardo C. Saria,* , SCCF p. 400-405.

[90] CURRIER is awaiting the entry of judgment against Saria (ordered as a discovery sanction) in CURRIER's legal malpractice action against Saria, San Francisco Superior Court Case No. CGC-04-433737.

[91] (1998) 67 Cal.App.4th 295, 315.

[92] *Defendant Communication Bridge Global,Inc.'s Notice of Motion and Motion for Judgment on the Pleadings; Memorandum of Points and Authorities in Support Thereof; Request for Judicial Notice in Support Thereof* ; SCCF 1203-

allegations made against CURRIER are the same allegations made against CBG[93]. The reason CBG did not present a defense was that CHOW's economic oppression of CURRIER and CBG made it impossible for CBG to defend itself[94].

Finally, CBG moved for relief from judgment as soon as it had the financial means to hire Jeffrey Weiss as its legal counsel. As such, this Court can and should set aside the judgment[95].

3. CBG Has Met the Standard of Proof for Equitable Relief.

CBG has met the standard of proof necessary to obtain equitable relief from the default judgment against it. Under California law, a party must make a substantially higher showing of good cause (i.e. extrinsic fraud), due diligence, and a meritorious case to obtain relief from judgment when seeking such relief pursuant to the court's inherent equitable power than pursuant to C.C.P. §473[96]. Unfortunately, none of the cases listed in the footnotes here, nor any other case revealed by CBG's research states exactly what showing is

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[93] *Id.*

[94] *Declaration of Paul Talcott Currier In Support of Motion for Relief From Default Judgment*, SCCF pp. 1030- 1072, ¶¶2-4; *Case Management Statement*, SCCF p. 416-614, at pp. 425, 451-457.

[95] See Exhibits 1 and 2 to Exhibit A to *Defendant Communication Bridge Global, Inc.'s Reply Memorandum of Points and Authorities in Support of Motion for Relief From Default Judgment.* (the exhibits are attached to the *Declaration of Jeffrey Weiss in Support of Motion for Relief from Judgment*, which apparently was stapled to the back of the reply memorandum before filing) SCCF p. 1096-1175, at pp. 1099.

[96] *In re Lake* 202 B.R. 751, 758 (9th Cir. BAP 1996), citing *In re Marriage of Stevenot* (1984) 154 Cal.App.3d 1051, 1074.

required[97]. Since the standard for a §473 motion detailed in *Weitz* and followed in *Mink v. Superior Court*[98], is "very slight evidence" where there is no prejudice to the opposing party, it follows that the standard of showing is something more than "very slight evidence" and something no more than a preponderance of the evidence, since that is the standard of proof in a civil proceeding. Finally, CBG moved for relief from judgment as soon as it had the financial means to hire Jeffrey Weiss as its legal counsel. As such, this Court can and should set aside the judgment.

4. CBG Has Met the Standard of Proof For A Motion To Vacate Judgment

It is clear a party seeking relief pursuant to the courts equitable power on the grounds of extrinsic fraud more than six months after entry of a default judgment must make substantially higher showing of extrinsic fraud than would a party seeking relief from default pursuant to C.C.P. §473. *In re Lake*, citing *In re Marriage of Stevenot*. *Stevenot* cites *Carroll v. Abbot Laboratories*, which cites to *Weitz v. Yankosky*, which in turn, cites to *Watson v. Dillon* for the proposition that "A stronger showing is required to justify the annulment of a judgment than is required for the opening of a default as provided by section 473 of the Code of Civil Procedure."

Unfortunately, none of the cases listed, nor any other case revealed by CBG's research states exactly what showing *is* required. Since the

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[97] *Stevenot* cites *Carroll v. Abbot Laboratories* (1982) 32 Cal.3d 892, 901 fn. 8, which cites to *Weitz v. Yankosky* (1966) 63 Cal.2d 849, 857, which in turn, cites to *Watson v. Dillon* (1936) 6 Cal.2d 33, 42-43 for the proposition that "A stronger showing is required to justify the annulment of a judgment than is required for the opening of a default as provided by section 473 of the Code of Civil Procedure." *Watson*, at 43.

[98] (1992) 2 Cal.App.4th 1338, 1343, citing *Weitz*, supra, at 857.

standard for a §473 motion detailed in *Weiss* and followed in *Mink v. Superior Court*, is "very slight evidence" where there is no prejudice to the opposing party, it follows that the standard of showing is something more than "very slight evidence," but there appears to be no direct guidance from the legislature or the courts as to the proper standard for relief from judgment on the grounds of extrinsic fraud.

Since there is a dearth of guidance as to the standard of proof for relief from judgment entered by extrinsic fraud, the interpretation of a similar statute can be used to determine the proper standard by analogy.

For example, the standard for vacation of a sister state judgment on the grounds that California law would have provided a defense against the judgment had the sister state case been heard in a California court, pursuant to C.C.P. §1710.40, is "preponderance of the evidence[99]." Analogously, the standard for vacating a judgment on other grounds is probably the same or lower than a preponderance of the evidence, since in a C.C.P. §1710.40 case, the party seeking relief had at least some sort of hearing in a sister state. In a case where equitable relief from judgment is being sought, the party seeking relief has obtained *no* hearing on the merits whatsoever! As such, it stands to reason that a party seeking such relief should be required to make a substantial, but not overwhelming showing that the party's case satisfies all three *Gibble* elements in order to obtain equitable relief.

In any event, as detailed above, CURRIER obtained a defense judgment without even putting on a defense case-in-chief at trial in this action[100]. No other persons were alleged to have taken any

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[99] *Tom Thumb Glove Co. v. Han* (1978) 78 Cal.App.3d 1, 5.

[100] *Statement of Decision*, SCCF pp. 938, 950, citing tentative decision to grant judgment pursuant to C.C.P. §631.8 and affirming it.

action against CHOW on behalf of CBG[101]. Since the only agent of CBG alleged to have performed any actions against CHOW was found not liable, it stands to reason that *respondeat superior* nor any other theory of vicarious liability can attach to CBG here. As the California Supreme Court held 58 years ago:

> "It is the firmly-established rule that a judgment on the merits favorable to an employee in an action by a third person for a tort of the employee is a bar to an action by the third person against the employer where the latter's asserted liability for the tort rests upon *respondeat superior* and not his independent tort[102]."

As such, CBG has an overwhelmingly strong case for vacating the judgment here.

4. This Court May Grant Relief for Equitable Reasons

It is established law that a court of equity may grant relief from a default judgment against a defendant in an independent action in equity when the defendant was prevented from presenting a

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[101] Exhibits 1 and 2 to Exhibit A to *Defendant Communication Bridge Global, Inc.'s Reply Memorandum of Points and Authorities in Support of Motion for Relief From Default Judgment.* (the exhibits are attached to the *Declaration of Jeffrey Weiss in Support of Motion for Relief from Judgment*, which apparently was stapled to the back of the reply memorandum before filing) SCCF p. 1096-1175, at pp.1113-1159.

[102] *Freeman v. Churchill* (1947) 30 Cal.2d 453, 461; *Lathrop v. Healthcare Partners Medical Group* (2004) 114 Cal.App.4th 1412, 1423 -"Because the vicarious liability of the employer is wholly dependent upon or derivative from the liability of the employee, any substantive defense that is available to the employee inures to the benefit of the employer." [citing *Churchill*, supra]

case in the prior proceeding by extrinsic fraud or mistake[103]. This is true even though a motion to vacate a default has been denied in the previous action[104]. Since this court is empowered to interpret inconsistent verdicts and judgments where the trial court refuses to do so, and this appellate court has its own equitable power to vacate obviously-unfair judgments, it should do so.

5. Appellee's Opposition Arguments Regarding the Failure to File a Proposed Answer Had No Merit.

The fact that no proposed answer was filed with the motion to vacate the default judgment is inconsequential; the proposed motion for judgment on the pleadings was attached to the reply brief[105].

D. Relief From Default is Proper Here, As the Default Judgment Is Inconsistent with a Judgment Obtained From an Actual Trial on the Merits In the Same Case.

It is clear that where a default judgment is not consistent with a judgment after trial based on the same fact and law, the defaulting party's motion to vacate the default should be granted[106]. See, for example, California Code of Civil Procedure §§663 and 663a, which allow courts to substitute a correct judgment for an obviously incorrect judgment, if a motion is made by one of the parties within 180 days of the entry of the judgment. CHOW did not address this issue in his opposition, and thus, it

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[103] *Marriage of Olsen* (1994) 24 Cal.App.4th 1702, 1706-1707.
[104] *Huff v. Mendoza* (1980) 109 Cal.App.3d 677, 680.
[105] Exhibit A to *Defendant Communication Bridge Global, Inc.'s Reply Memorandum of Points and Authorities in Support of Motion for Relief From Default Judgment.* SCCF p. 1096-1175, at pp.1105-1175.
[106] *Craven v. Crout* (1985) 163 Cal.App.3d 779, 782-783.

was inappropriate to deny the motion to vacate the default where that issue was not addressed[107].

On a motion to correct an inconsistent or mistaken verdict, when the trial court refuses to interpret the verdict, the appellate court will, where possible, provide the correct interpretation[108]. Analogously, since the trial court here erroneously refused to interpret the inconsistent default judgment in light of the judgment after trial, this appellate court should do so. This court should vacate the default in favor of CHOW and enter a judgment in favor of CBG.

Similarly, a trial court's failure to make findings of fact did not preclude motion to vacate judgment because such a motion is a remedy to be used when the trial court drew incorrect conclusions of law, or rendered a an erroneous judgment, based on uncontroverted evidence and was not dependent upon whether the trial court made findings of fact[109].

To reiterate CBG's position on this issue, the complaint filed in this action states only facts alleging actionable conduct by CURRIER[110]. No one else is alleged to have taken any action harmful to the Plaintiffs on CBG's behalf. *Id.* The Plaintiffs took their case against CURRIER in this action to trial and lost on all causes of action[111]. Since the

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[107] See, for example, *Salazar v. Upland Police Department* (2004) 116 Cal.App.4th 934, 939 [summary judgment on cause of action not addressed in motion reversed as inappropriate].

[108] *Shapiro v. Prudential Property & Casualty* (1997) 52 Cal.App.4th 722, 729.

[109] *Simac Design, Inc. v. Alciati* (1979) 92 Cal.App.3d 146, 153.

[110] Exhibits 1 and 2 to Exhibit A to *Defendant Communication Bridge Global, Inc.'s Reply Memorandum of Points and Authorities in Support of Motion for Relief From Default Judgment.* (the exhibits are attached to the *Declaration of Jeffrey Weiss in Support of Motion for Relief from Judgment*, which apparently was stapled to the back of the reply memorandum before filing) SCCF p. 1096-1175, at pp.1113-1159.

[111] See the *Statement Of Decision*, SCSF, p. 938-951, at 950.

facts supporting all the causes of action against CURRIER and CBG allege only conduct by CURRIER, and since a corporation can act only through its officers, directors, employees, or other agents who are natural persons[112], it follows that none of the causes of action against CBG have any evidentiary support, since the facts were found not to support any causes of action against CURRIER[113]. Since CBG could not possibly have been found liable for damages pursuant to any of the causes of action asserted against it, it would be both inequitable and against the interests of justice to allow the default judgment against CBG in the instant action to stand.

This court has an inherent equitable power to set aside judgments that are inequitable and contrary to the interests of justice and the law. This is a case in which the Court should exercise that power, because the default judgment is inherently inequitable, having been obtained by "extrinsic fraud or mistake" and the positive misconduct of CBG's attorneys, and also because the default judgment against CBG is not consistent with the judgment in favor of CURRIER after trial.

Plaintiff CHOW filed an opposition to the motion, based on the fact that no proposed answer was filed with the motion[114]. CHOW also opposed the motion based on his assertions that CHOW did not commit any fraud that concealed this action's existence or the need to file a responsive pleading from CBG[115]. Finally, CHOW opposed the motion on

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[112] *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 25; *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55,77 *rehearing denied, and review denied.*; *Black v. Bank of America* (1994) 30 Cal.App.4th 1,6 *review denied*;

[113] *Id.*

[114] *Opposition of Plaintiffs to Defendant Communication Bridge Global, Inc.'s Motion to Vacate Default Judgment*; SCCF p. 1092-1095.

[115] *Id.*

the grounds that CBG waited too long to file it. None of those arguments had any merit[116].

Furthermore, the denial of the motion to vacate the judgment in this case was also inconsistent with judgment in Case No. 323391, where default vacated against CBG in that case, as stated above.

As the California Supreme Court noted 22 years ago in *Modnick, supra,*

> "No abstract formula exists for determining whether a particular case involves extrinsic, rather than intrinsic, fraud. 'It is necessary to examine the facts in the light of the policy that a party who failed to assemble all his evidence at the trial should not be privileged to relitigate a case, as well as the policy permitting a party to seek relief from judgment entered in a proceeding in which he was deprived of an opportunity fully to present his case[117].'"

The *Modnick* rule holds true today. While equitable relief is not meant to be an "escape hatch" for attorneys or *pro se* litigants who were incompetent or unprepared for a trial or dispositive motion, it is intended to provide justice to those who were previously denied their "day in court[118]."

However, one exception to the above-stated rule that equitable relief is not available where a party fails to perform competently at trial is where a party's attorney utterly fails to represent the client[119]. Equitable relief from a judgment is

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[116] *Id.*

[117] *Modnick*, supra, at 905 citing *Jorgensen v. Jorgensen* (1948) 32 Cal.2d 13, 19.

[118] *In re Marriage of Stevenot* (1984) 154 Cal.App.3d 1051, 1069 [aggrieved party's representation by counsel normally precludes a finding of "extrinsic fraud" against that party]

[119] *People v. One Parcel of Land* (1991) 26 Cal.App.3d 579, 584.

especially proper where a fiduciary duty was breached, or the defaulting party's rights were violated by, the party in whose favor the judgment was issued[120]. In this case, CBG was denied its day in court because of : (1) CHOW's intentional acts, which CHOW's fiduciary duties to CURRIER and CBG; (2) Spohn's breach of his fiduciary duty to CURRIER and CBG; and (3) Saria's breach of his fiduciary duties to both of his clients, CURRIER and CBG, as Saria committed outright admitted gross attorney malpractice in the underlying case.

To reiterate CBG's position on this issue, the complaint filed in this action states only facts alleging actionable conduct by CURRIER[121]. No one else is alleged to have taken any action harmful to the Plaintiffs on CBG's behalf. The Plaintiffs took their case against CURRIER in this action to trial and lost on all causes of action[122]. The facts supporting all the causes of action against CURRIER and CBG allege only conduct by CURRIER, and since a corporation can act only through its officers, directors, employees, or other agents who are natural persons, it follows that none of the causes of action against CBG have any evidentiary support. That is because the facts were found not to support any causes of action against CURRIER[123]. Since CBG could not possibly have been found liable for damages pursuant to any of the causes of action asserted against it, it would be both inequitable and against the interests of justice

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[120] See, for example, *Kondo*, supra, at 834; *Sanders*, supra, at 615.

[121] Currier Dec., ¶6, Exhibit 1 to the Currier Dec.

[122] *Statement Of Decision*, SCSF, p. 938-951, at 950.

[123] *Id.*, at 948 "Chow's testimony that he would not have joined Currier in this venture does not ring true. The Court finds that the blame fixed on defendant Currier's nondisclosure by Plaintiff is a revisionist theory concocted by Chow. The court further finds that Chow's causes of action based on nondisclosure have no substance or merit whatsoever."

to allow the default judgment against CBG in the instant action to stand.

III. CONCLUSION

For the reasons stated above, CBG's motion for relief from default judgment should have been granted. The trial court's order denying the motion for relief from default judgment should be reversed.

This court should also enter judgment for CBG at this time. Since entry of judgment is all that is left to conclude this matter, CBG humbly requests relief from default and entry of judgment in its favor at this time.

Respectfully submitted,
WEISS & WEISSMAN

Dated: September 26, 2005

By:/s_____
Jeffrey Marc Weiss
Attorneys for
Defendant
Communication
Bridge Global, Inc.

A011455

IN THE COURT OF APPEAL OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

ROBERT CHOW,
Plaintiffs,

vs

PAUL TALCOTT CURRIER,
COMMUNICATION BRIDGE GLOBAL, INC.,
Defendants.

AND RELATED ACTIONS.

Appeal from the Superior Court, San Francisco County
Hon. Ronald Quidachay, Judge

MOTION FOR RECONSIDERATION OF ORDER DENYING REQUEST FOR JUDICIAL NOTICE AND MOTION TO AUGMENT THE RECORD ON APPEAL

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[Entered January 18, 2006]

Pursuant to this Court's inherent equitable powers, as well as this Court's power to manage its own proceedings, as well as this Court's power to relieve a party from default for failure to comply with the California Rules of Court pursuant to C.R.C. 45(e). Defendant-Appellant Communications Bridge Global, Inc. ("CBG") will request, and hereby requests, that this Court reconsider its January 6th, 2006 ruling on the *Request for Judicial Notice*, as well as the *Motion to Augment Record on Appeal*, both filed by CBG on December 5th, 2005. In light of the *Reply Brief in Support of Motion to Augment Record on Appeal; Memorandum of Points and Authorities; Reply Declaration of Jeffrey Marc Weiss in Support of Motion to Augment Record; Declaration of Paul Talcott Currier; Exhibits*, and the *Reply in Support of Requests for Judicial Notice; Memorandum of Points and Authorities; Additional Declaration of Jeffrey Marc Weiss; Exhibits*, filed herewith, CBG requests reconsideration by the Court now due to new evidence not available until just recently.

This motion is supported by the memorandum of points and authorities below, as well as the *Additional Declaration of Jeffrey Marc Weiss in Support of Request for Judicial Notice* and the *Declaration of Paul Talcott Currier*, filed separately here with CBG's reply in support of that motion, and the *Reply Declaration of Jeffrey Marc Weiss in Support of Motion to Augment Record* filed separately with the *Reply in Support of Requests for Judicial Notice*, filed separately herewith in support of those requests.

Respectfully submitted,
WEISS & WEISSMAN

Dated: January 18, 2006

By: /s
Jeffrey Weiss
Attorneys for
Defendant
Communication
Bridge Global, Inc.

MEMORANDUM OF POINTS AND AUTHORITIES

This application is made pursuant to C.R.C. 45(e), which states

"(e) Relief from default

For good cause, a reviewing court may relieve a party from default for any failure to comply with these rules except the failure to file a timely notice of appeal or a timely statement of reasonable grounds in support of a certificate of probable cause."

In the instant action, the failure to designate the reporter's transcript of the trial in the underlying action, San Francisco Superior Court Case No. 323394, coupled with a deceitful misrepresentation of fact by the counsel for Appellee Robert Chow regarding the dismissal of virtually all causes of action in the underlying action, has caused a significant gap in the record this Court needs to understand the issues in this case. Additionally, CBG has been presented with new evidence of positive attorney misconduct committed by its former general counsel, attorney Vincent Spohn. The new evidence is the California Supreme Court's January 4th, 2006 action upon Currier's accusation against Vincent Spohn, and the January 10th, 2006 California State Bar

response to the California Supreme Court's order *en banc* of January 4th, 2006.

CBG moved to augment the record in this case to include excerpts from the reporter's transcript, and filed a request for judicial notice of Currier's accusation against Vincent Spohn, which Currier filed with the California Supreme Court and the California State Bar. The aforementioned motion and request were both opposed by Appellee Robert Chow.

CBG was unable to locate the relevant excerpts of the trial transcript from Case No. 323394, partially because the court reporter from the trial in the underlying case did not send the last volume of the trial transcript to CBG until December 21st, 2005[124]. The unfortunate consequence of CBG's delay in filing a reply brief in support of the motion to augment the record and the request for judicial notice, is that both were denied by this Court on January 6th, 2006. The motion to augment the record may have been denied because no specific excerpts from the trial transcript were provided to this court, and the request for judicial notice may have been denied because there was no evidence of the Supreme Court having taken action based on Paul Currier's November 4th, 2005 accusation against CBG corporate counsel Vincent Spohn.

The failure to grant the motion to augment the record and the resultant failure to consider the transcript excerpts could cause this Court to fail to understand that the causes of action plead against CBG and Currier, which were not discussed in Judge Goldsmith's *Statement of Decision*, had in fact previously "been dismissed on the record" at

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[124] *Reply Declaration of Jeffrey Marc Weiss in Support of Motion to Augment Record*, at ¶8.

trial[125]. The failure to grant the request for judicial notice could potentially further mislead this Court into believing that Vincent Spohn did not commit significant attorney misconduct warranting relief from the default judgment[126]. Further, the failure to grant consideration of short excerpts of the trial transcript could cause the Court to neglect the fact that Chow and his counsel lied to this Court about undisputed facts.

Respectfully submitted,
WEISS & WEISSMAN

Dated: January 18, 2006

/s
Jeffrey Marc Weiss
Counsel for Defendant-Appellant
COMMUNICATION BRIDGE GLOBAL, INC.

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[125] *Additional Declaration of Jeffrey Marc Weiss in Support of Request for Judicial Notice*, ¶¶7-10, Exs. 1-4.

[126] *Additional Declaration of Jeffrey Marc Weiss in Support of Request for Judicial Notice*, ¶¶11, Ex. 5.

A011455

IN THE COURT OF APPEAL OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

ROBERT CHOW,
Plaintiffs,

vs.

PAUL TALCOTT CURRIER,
COMMUNICATION BRIDGE GLOBAL, INC.,
Defendants.

AND RELATED ACTIONS.

Appeal from the Superior Court, San Francisco County
Hon. Ronald Quidachay, Judge

REPLY BRIEF IN SUPPORT OF MOTION TO AUGMENT RECORD ON APPEAL; MEMORANDUM OF POINTS AND AUTHORITIES; REPLY DECLARATION OF JEFFREY MARC WEISS IN SUPPORT OF MOTION TO AUGMENT RECORD; DECLARATION OF PAUL TALCOTT CURRIER; EXHIBITS

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[Entered on January 18, 2006]

This is the reply of the Appellant, Communication Bridge Global, Inc. ("CBG") in support of its request for augmentation of the record on appeal to include certain excerpts from the reporter's transcript in San Francisco Superior Court Case No. CGC-01-323394. The request was and is made pursuant to Rule 12, subdivision (a) of the California Rules of Court.

Copies of the excerpts to be added to the record are attached to this reply brief. CBG apologizes for not being able to locate the relevant portions of the reporter's transcripts at an earlier time, but CBG was certain that the excerpts were in the transcripts of the proceedings of November 29 and 30, 2004, and CBG had not received the transcripts of the proceedings for both of those dates until after the initial motion for augmentation, on December 21, 2005. Between that, the vacation schedule of Jeffrey Marc Weiss, CBG's counsel, and the press of business[127], CBG was unable to file this motion at an earlier time. The relevant excerpts are attached as exhibits to the *Reply Declaration of Jeffrey Marc Weiss In Support of Motion to Augment Record*, below.

CBG previously asserted that the causes of action against CBG and co-defendant Paul Talcott Currier ("Currier") were dismissed by Judge Goldmsith at trial on November 30, 2004. However, upon further review of the trial transcripts, CBG learned that Michael Fish ("Fish"), then counsel for plaintiff-appellee Robert Chow, voluntarily withdrew each and every cause of action against Currier that was also stated and plead against CBG at trial in the instant action.

This reply is based upon the attached memorandum of points and authorities and reply declaration from Jeffrey Marc Weiss, as well as the exhibits attached hereto.

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[127] See, generally, the *Declaration of Jeffrey Marc Weiss in Support of Motion for Reconsideration*, filed separately herewith as part of CBG's *Motion for Reconsideration of Order Denying Motion to Augment Record and Request for Judicial Notice*.

Respectfully submitted,
WEISS & WEISSMAN

Dated: January 18, 2006 By: /s
Jeffrey Weiss
Attorneys for Defendant
Communication Bridge
Global, Inc.

MEMORANDUM OF POINTS AND AUTHORITIES

This Court is empowered to augment the record pursuant to California Rule of Court 12(b)[128]. Such augmentation may be made either upon motion or by the court *sua sponte*. For example, in *McLaughlin v. Walnut Properties, Inc.*[129], the court *sua sponte* augmented the record to include missing documents on a summary adjudication appeal because the issue was purely one of law; the facts were undisputed.

In this case, the excerpts of the reporter's transcripts should be admitted solely for the purpose of establishing an indisputable fact - the dismissal at trial of the causes of action stated against both Currier and CBG.

In the trial transcript, Fish specifically stated:

> "We [i.e. Chow, as represented by Fish] are not going to proceed on ... the tenth cause of action for breach of contract, and the fourteenth cause of action for defamation. We are not proceeding on the first cause of action for conversion; the third cause of action for violation of the Business and Professions Code §17200; the Ninth Cause of Action for Unjust Enrichment; the Eleventh Cause of Action for Intentional Interference with Economic Advantage; nor Number Twelve, RICO, and [the] Thirteenth Cause of

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[128] *Russi v. Bank of America* (1945) 69 Cal.App.2d 100, 102.

[129] (2004) 119 Cal.App.4th 293, 299.

Action for Quantum Merit [*sic*][130].

The transcript excerpts would be crucial in determining a claim made by Appellee Robert Chow ("Chow"), namely that none of the claims against CBG were tried when Chow took his claims against Paul Talcott Currier ("CURRIER") to trial. The fact is, all the causes of action not mentioned in the *Statement of Decision* issued by Judge Goldsmith were voluntarily withdrawn by Chow's counsel at the November 2004 trial against Paul Talcott Currier, as stated above. Even if they were not, the same causes of action were cited by Judge Goldsmith as being without merit.

> THE COURT: I want to tell you [Currier] and I want to tell Mr. Fish what I think this case boils down to. After we got through all these causes of action, you got conversion, fraud and deceit, violation of Business [and Professions] Code Section 17200 negligence, misrepresenting, intentional breach of fiduciary duty, constructive fraud, negligent breach of fiduciary duty, unjust enrichment, breach of contract, [and] intentional interference with economic advantage.
>
> Probably what you're left with so far from what I've seen is the allegation pertaining to libel[131].

It is clear from those two transcript excerpts alone that Judge Goldsmith did, in fact, consider all the causes of action plead against both Currier and CBG that were not actually voluntarily dismissed by Fish during the trial against Currier. Obviously, both Fish and Judge Goldsmith found that those causes of action, stated against Currier, had no merit.

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[130]Trial (Reporter's) Transcript, Vol. 5. Ex. 4 to the *Reply Declaration of Jeffrey Marc Weiss In Support of Motion to Augment Record*, ("Weiss Dec.") p. 407:23 - 408:5.

[131]Weiss Dec., Ex. 5; 490:6-15.

Currier was the only alleged, and indeed, the only possible, agent of CBG who could have performed any of the tortious acts Chow alleged against CBG and Currier[132]. Therefore, if Currier was found not to have wronged Chow, CBG could not possibly have wronged Chow. It is plainly obvious from these undisputable facts that the default judgment entered against CBG cannot withstand any examination based on the merits of the case, and as such, ought to be vacated.

CBG acknowledges that a motion to augment the record filed after a previous motion for augmentation has been filed "will only be entertained upon a showing of good cause[133]."

As stated in the initial moving papers in support of this motion, counsel for CBG was surprised by Chow's assertion that none of the causes of action stated against CBG were tried against CURRIER, and upon finding that there is nothing in the Superior Court case file memorializing the dismissal of the causes of action stated against both CBG and CURRIER.

Furthermore, CBG was "surprised" by the flat-out lies Chow's counsel has told this Court. In Chow's opposition to CBG's previous motion to augment the record to include the order granting relief from default in the sister case to this action, San Francisco Superior Court Case No. 323391 ("323391"), Chow stated that CBG's introduction of that document would unfairly prejudice Chow because the document would be out of context.

However, at trial in the instant action, Chow's counsel requested that the Court take judicial notice of 323391.

> Additionally, there is a companion case that was filed approximately the same time, and at certain point we'll be asking the Court to take judicial notice of that, and that case is No. 323394 - - I'm

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[132] There were never any causes of action stated by Chow against CBG only. Weiss Dec., ¶7.

[133] 1st Appellate Dist. R. 6(b).

sorry - - 323391, and that's Communication Bridge USA versus the same defendants in this case[134]

Chow simply cannot "have it both ways." Either 323391 should be considered in this appeal or it should not. It is plainly obvious that even Chow admits that the cases are as related as conjoined Siamese twins and should be thus considered "companions" together. Even Chow's own legal counsel had a hard time distinguishing the two cases, as seen in the quote directly above. The reasons the cases should be considered together are stated in the opening and reply briefs of this appeal. Those reasons boil down to the facts that the nucleus causes of action are virtually the same, and the basis of all facts alleged by Chow in both 323391 and 323394 are an identical nexus. The parties in each case were either identical or in privity with parties to the sister case. Therefore, what happened in 323391 is directly relevant to the judgment in 323394, and should be considered by this Court.

The question in this Court's collective mind should be "Why is Chow trying to hide the truth from us?" The answer is, of course, because, while it furthers the cause of justice and this court's understanding of the case, it harms Chow's case. The introduction of both evidence from Case No. 323391 and the reporter's transcript in Case No. 323394 is necessary because this evidence accurately portrays Robert Chow as a bully, thief, and villain who enjoys abusing legal process and who stubbornly refuses to take responsibility for his own actions.

Finally, CBG was taken by surprise by Chow's factually erroneous assertion that the causes of action he plead against CBG were not ruled upon by the trial court. In addition to the passages from the trial transcript cited above, Judge Goldsmith also expressed his opinion regarding the RICO cause of action at several other points in the trial transcript. The transcript factually proves that, early in the trial, Fish voluntarily dismissed over one half of his initial causes of action, including RICO. "The Court: You don't have RICO. ... Well, [Fish is] not

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[134]Weiss Dec., Ex. 1: 8:6-11.

proceeding on it[135]." "The Court: There's no RICO issue here[136]."

Finally, the transcripts are essential to show that Spohn committed perjury under oath by testifying that he had no contact with Fish prior to the trial date, when Spohn was, in fact, the corporate counsel for CBUSA who had hired Fish according to Fish's later sworn declaration [137].

Spohn also admits that Currier was Spohn's client before CBUSA was his client, and that he admitted he was asked to do legal work for both CBG and CBUSA[138]. Spohn further perjured himself by denial of his factual legal relation as concurrent general counsel for both CBG as well as CBUSA. These facts are essential to showing that Spohn committed positive misconduct against both his clients- Currier, CBUSA, *and CBG*. Even tacit admission of having committed positive misconduct by working for CBUSA, while an unwaived conflict of interest between CBUSA and Currier existed - Spohn in fact did gain confidential information of Currier's and CBG's that was material to Spohn's employment with CBUSA. Spohn did not obtain Currier's permission to continue representing CBUSA[139], while, in fact, Spohn did continue as corporate counsel for CBUSA, by hiring Fish to sue Currier and CBG, and then immediately abandoned both Currier and

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[135]Weiss Dec., Ex. 2, at 209:19; 209:23. Fish also commented "I'll give up on the RICO." *Id.*, at 208:27-28.

[136]*Id*, Ex. 3, 265:21.

[137]Weiss Dec., Ex. 2, 59:25-28, 60:1-5; Ex. 6, *Declaration of Michael Fish In Support of Defendants' Motion to Strike*, ¶3 "In summer 2001, Vincent Spohn, corporate counsel for CBUSA referred Robert Chow to me to provide legal services regarding ... CBUSA".

[138]*Id.*, at 60:9-15; 62:24-63:13, 79:8-80:4; 149:5-150:4.

[139]California Rules of Professional Conduct, Rule 3-310(F).

CBG to *propria persona, pro se* self-defense. Currier attempted pen-to-paper pleadings as recorded in the files of these matters (Case Nos. 323391 and 323394) and a related felony false bankruptcy filed by Spohn's colleague, James McIntosh, illegally and fraudulently on behalf of Robert Chow. These cases are referenced in the bankruptcy file in Northern District of California Bankruptcy Court Case No. 01-32161. The bankruptcy is referenced in the case management statements for both companion cases. An attorney's positive misconduct is a ground upon which a court can and should vacate a default.

CONCLUSION

All the evidence cited above supports CBG's case for reversal of Judge Quidachay's May 12th, 2005 denial of relief from the default judgment against CBG, which was granted by Commissioner Loretta Norris on February 7th, 2003. All the evidence demonstrates that for justice to prevail, reversal is necessary.

Furthermore, based on the transcripts in CBG's included pleadings for request for judicial notice, both the State Bar and the California Supreme Court have noticed clear evidence of apparent violations of Rule 3-300 by Vincent Spohn, hired counsel for CBG. Mr. Spohn's status as an active member of the State Bar is now in jeopardy. On January 10th, 2006, the State Bar requested the full trial transcripts of Case No. 323394 from the co-defendant in that trial, Paul Currier. Appellant has only submitted excerpts of some of those same trial transcripts to this Court. To submit the full trial transcripts (two reams of paper) is not necessary to demonstrate that David Nied factually lied to this California Court of Appeals, in the instant appeal!

Due to the seriousness of this offense, factually and intentionally misstating the truth in order to affect the outcome of a tribunal, sanctions are now appropriate - in addition to reversal of the lower courts. Appellant requests sanctions be ordered by the appellate court against David Nied (State Bar No. 136413) of Chapman, Popik & White, LLP.

The first appropriate sanction is a $350,000 penalty, levied on Mr. Nied, to be payable to the Office of the General Counsel of the State Bar.
If sanctions are not imposed now, the Court clearly sends the message to all lawyers in California that willful and intentional dishonesty to the Bench is now the permissible law of our state.

The second appropriate consequence for the crime of lying to the Appellate Court is a $350,000.00 reversal of the default judgment in favor of Chow, reversed and awarded to CBG, to accompany judgment for CBG.

CBG further seeks punitive damages in the amount of $350,000.00 from Chow for failure to relieve CBG from the bogus default judgment Chow secured through the agency of Michael Fish, State Bar No. 98161, as hired CBUSA corporate litigator for CBUSA by Chow and CBUSA corporate counsel Vincent Spohn.

The positive misconduct CBG counsel Vincent Spohn committed against CBG, while Spohn also represented CBUSA and Currier in separate matters, is gross conflict of interest. The California Supreme Court already ruled on this matter *en banc* on January 4, 2006. This positive misconduct by Spohn against CBG is core to the instant appeal.

Current counsel for Chow, and Chow personally, have intentionally attempted to hide the truth from the appellate court. The consequence of all of these affirmative acts by Appellee and Appellee's counsel, when considered with the new evidence presented now, supports the additional award to CBG of its attorney's fees and costs in the amount of $75,000.00. CBG prays for attorney's fees and costs now, to accompany judgment for CBG and all the sanctions specified above. CBG does not seek criminal prosecution for lying to the court at this time.

For all the reasons stated above, CBG's motion to augment the record should be granted.

Respectfully submitted,

Dated: January 18, 2006 s/_____

Jeffrey Marc Weiss
Counsel for Defendant-
Appellant Communications
Bridge Global, Inc.

REPLY DECLARATION OF JEFFREY MARC WEISS IN SUPPORT OF MOTION TO AUGMENT RECORD.

I, Jeffrey Marc Weiss, declare:

1. I am the legal counsel for Appellant Communication Bridge Global, Inc. ("CBG") in this case. I have personal knowledge of the events detailed herein, and could testify about them competently in a court of law.

2. Attached hereto and hereby incorporated as Exhibit 1 is a true and correct copy of excerpts from Volume 2 of the trial transcript from San Francisco Case No. 323394, *Robert Chow v. Paul Talcott Currier et al.*

3. Attached hereto and hereby incorporated as Exhibit 2 is a true and correct copy of excerpts from Volume 3 of the trial transcript from San Francisco Case No. 323394, *Robert Chow v. Paul Talcott Currier et al.*

4. Attached hereto and hereby incorporated as Exhibit 3 is a true and correct copy of excerpts from Volume 4 of the trial transcript from San Francisco Case No. 323394, *Robert Chow v. Paul Talcott Currier et al.*

5. Attached hereto and hereby incorporated as Exhibit 4 is a true and correct copy of excerpts from Volume 5 of the trial transcript from San Francisco Case No. 323394, *Robert Chow v. Paul Talcott Currier et al.*

6. Attached hereto and hereby incorporated as Exhibit 5 is a true and correct copy of excerpts from Volume 6 of the trial transcript from San Francisco Case No. 323394, *Robert Chow v. Paul Talcott Currier et al.*

7. Attached hereto and hereby incorporated as Exhibit 6 is a true and correct copy of the *Declaration of Michael Fish in Support of Defendants'* [Special] *Motion to Strike*, filed in San Francisco Superior Court Case No. 05-440882.

8. CBG and I apologize for the delay in producing these transcript excerpts. I did not receive the last volume of the trial transcript from San Francisco Superior Court Case No. 323394 until December 21, 2005. As such, I was unable to search that volume of the transcript until after that date. During the last two weeks of December, 2005, I visited my daughter on a long-planned vacation to Morocco. Since my return to the USA, I also have also been through an unusually heavy volume of client business

towards the end of 2005 and the beginning of 2006. My primary practice is the practice of tax law.

9. In any event, the transcript excerpts show that the causes of action stated against CBG and Currier were dismissed voluntarily by Chow at trial. See, especially, page 407 and 408 of Exhibit 4, in which Michael Fish, then-counsel for Chow, voluntarily dismissed every cause of action that had been stated against CBG in the action. There were no causes of action alleged against CBG but not Currier. Currier was always the party Chow accused of acting as CBG agent for liability purposes in 323394.

I declare under penalty of perjury under California law that the foregoing is true and correct. Executed at San Francisco, California, this 18th day of January, 2006.

Dated: January 18, 2006 By: /s

Jeffrey Weiss
Attorneys for Defendant
Communication Bridge
Global, Inc.

DECLARATION OF PAUL TALCOTT CURRIER

I, Paul Talcott Currier, declare:

1. I am the Chief Executive Officer and Chairman of the Board of Defendant-Appellant Communication Bridge Global, Inc. ("CBG"). I have personal knowledge of the matters detailed herein, and if asked to testify thereabout, could do so competently.

2. I made the decision not to designate the reporter's transcript in the above-captioned appeal, as I did not believe it was necessary. I am not an attorney. I believed that it was clear from the clerk's transcript (i.e. the Superior Court case file from Case No. 323394) that all causes of action not decided by Judge Goldsmith in the *Statement of Decision* had been either voluntarily dismissed by Robert Chow's ("Chow's") trial counsel, Michael Fish, or had been dismissed by Judge Goldsmith at trial. I now realize that I was mistaken, and apologize to the court.

3. I did not become aware that there was no record of the dismissal of the causes of action in the clerk's transcript until the matter was brought to my attention by Chow's opposition to CBG's appeal. I hereby recant my designation of the record on appeal, and request permission from this Court to re-designate the record on appeal to include both the Superior Court case file from Case No. 323394 and the reporter's transcript from the trial in Case No. 323394.

I declare under penalty of perjury under California law that the foregoing is true and correct. Executed at South San Francisco, CA, this 18th day of January, 2006.

_____

Paul Talcott Currier

S138541

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re the Accusation of PAUL T. CURRIER Against An Attorney

At its request, the above entitled accusation against an attorney is transferred back to the State Bar Office of the Chief Trial Counsel for further investigation.

SUPREME COURT
F I L E D

JAN -4 2006

Frederick K. Ohlrich Clerk

Deputy

/s GEORGE
Chief Justice

Constitutional Provisions Involved In This Case

First Amendment to the U.S. Constitution:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fourth Amendment to the U.S. Constitution

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment to the U.S. Constitution:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."